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15 3000
No. 14927

United States
Court of Appeals
For the Ninth Circuit

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation; SHELL OIL COMPANY, a
Corporation; THE TEXAS COMPANY, a
Corporation; RICHFIELD OIL CORPORA-
TION, a Corporation; GENERAL PETRO-
LEUM CORPORATION, a Corporation;
TIDE WATER ASSOCIATED OIL COM-
PANY, a Corporation and UNION OIL COM-
PANY OF CALIFORNIA, a Corporation;

Appellants,

vs.

GEORGE F. MOORE,

Appellee.

INDEX TO
Transcript of Record

Appeals from the United States District Court,
Western District of Washington.
Northern Division.

FILED

APR - 2 1956



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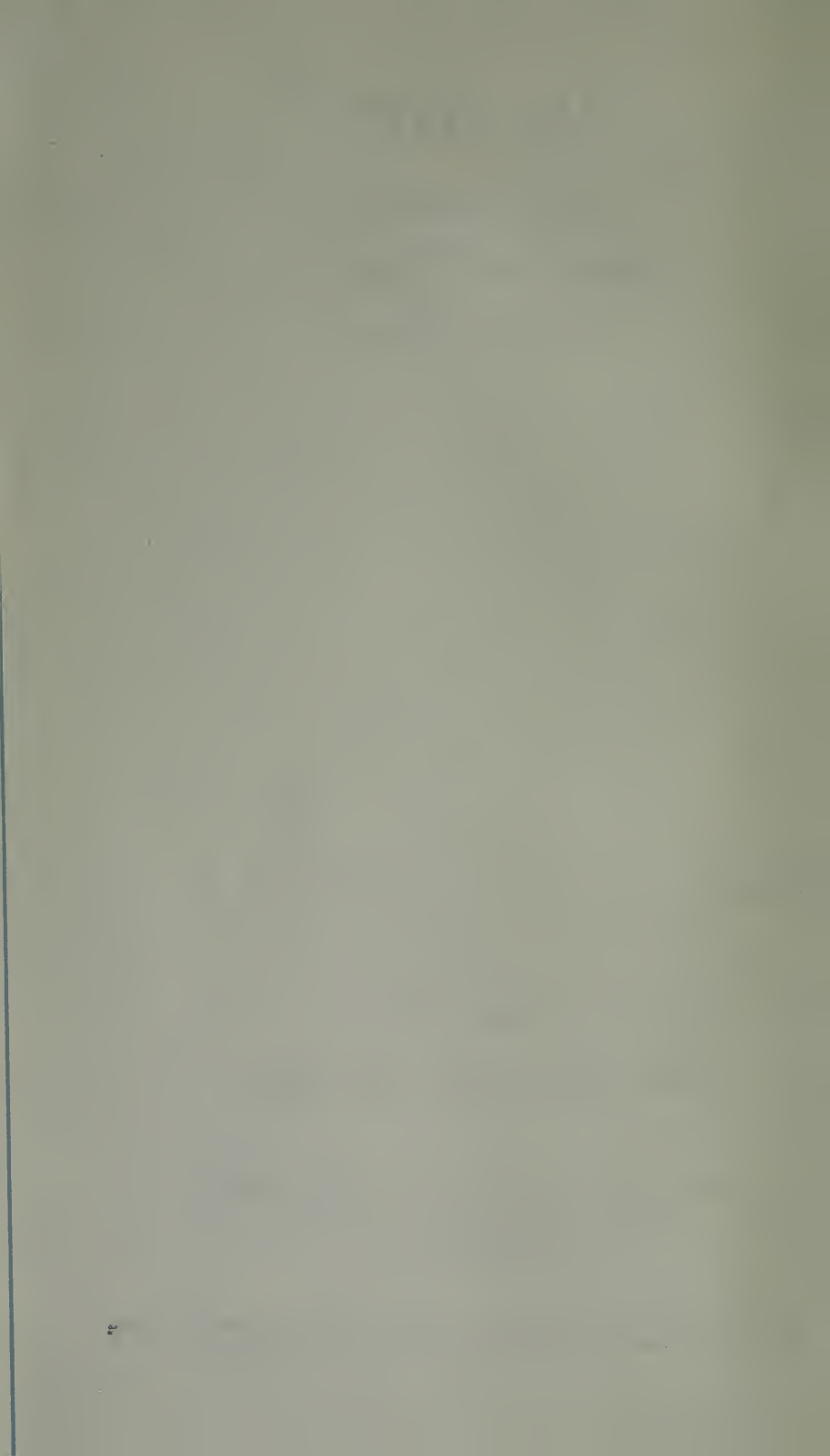
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Appeals from the United States District Court,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavits of:	
Ambler, John	526
Burdell, Charles (Re: Lawson, Walter H.) .	514
Calhoun, I. M.	513
Davidge, R. N.	487
Davidson, Thea	510
Deviou, Raymond	507
Fetterman, Paul (Re: Juror McKenzie)	519, 524
Holen, Andrew	506
Ibsen, Bert	503
Lawson, Walter H.	517
McKenzie, Eunice	504, 521
Miller, Pendleton (Re: Juror McKenzie)	
.....	518, 523
Osterloh, Alma	509
Pelton, E. R.	512
Smid, Lola	508
Wallace, Merrill (Notary Public)	516
Williams, DeWitt (Re: Affidavit of Mc-	
Kenzie, Eunice)	497

INDEX	PAGE
Affidavit of Burdell, C. S. in Support of Plaintiff's Motions to Strike Affidavit of Davidge, R. N. and McKenzie, Eunice and to Grant an Extension of Time for the Filing of Counter Affidavits	498
Affidavit of Defendants' Attorneys Re Affidavit of R. N. Davidge	484
Affidavit of McKenzie, Eunice, Filed in Support of the Motions of Defendants, and Each of Them, for a New Trial	494
Amendment to Motion to Strike Evidence Relating to Acts and Conduct of Alleged Co-Conspirators (Part II)	334
Answer to First Amended Complaint by:	
General Petroleum Corporation	53
Richfield Oil Corporation	36
Shell Oil Company	125
Shell Oil Company, Inc.	42
Standard Oil Company of California	51
Standard Oil Company of California (Supplemental)	35
The Texas Company	46
Tide Water Associated Oil Company	23
Union Oil Company of California	27
Ex. A—Letter, Dated August 11, 1953 .	34

INDEX

PAGE

Answer to Request for Admissions by:

General Petroleum Corporation	172, 176
Richfield Oil Corporation	156
Shell Oil Company	158
Standard Oil Company	164
The Texas Company	160
Tide Water Associated Oil Company	171
Union Oil Company of California	152

Appeal:

Certificate of Clerk to Record on	7641
Joint Statement of Points on	7690
Motion for Extension of Time for Filing Record on and Docketing	539
Notice of	531, 532, 533, 534, 535
Order Extending Time for Filing Record on and Docketing	543
Statement of Points on, Supplemental (The Texas Co.)	7688

Application by Appellants for an Extension of Time Within Which to File the Designation of Record and Statement of Points	7683
Affidavit of Kirkham, Francis R., in Sup- port of Application	7684
Order Re	7686

INDEX	PAGE
Certificate of Clerk to Record on Appeal	7641
Complaint, First Amended	3
Counsel, Names and Addresses of	1
Further Motion to Strike Exhibits Offered to Establish Hearsay Statements Therein Con- tained	347
Further Motion to Strike Oral Evidence of Acts and Conduct of Alleged Co-Conspirators	341
Further Motion to Strike Oral Evidence of Declarations and Admissions by Alleged Co- Conspirators	339, 343
Joint Specifications of Errors in Law Occurring at the Trial Relied Upon in Support of Their Several Motions for a New Trial, Defend- ants'	401
Joint Statement by Appellants of the Points on Which They Intend to Rely	7690
Judgment and Decree	370
Judgment of Dismissal as to Shell Oil Co., Inc. .	367
Motion to Add Additional Party Defendant . . .	109
Affidavit of Burdell, Charles S.	110
Motion to Amend Complaint by Interlineation .	105
Motions on Behalf of Standard Oil Co. of Calif. to Strike Certain Evidence and for a Directed Verdict	322

INDEX	PAGE
Motion for Directed Verdict by:	
General Petroleum Corporation	348
Richfield Oil Corporation	282, 356
Shell Oil Company	318
The Texas Company	328
Tide Water Associated Oil Company	351
Union Oil Company of California	324
Motion for Extension of Time for Filing Record on Appeal and Docketing Appeals	539
Affidavit in Support of	541
Motion to Have the Verdict and Judgment Herein Set Aside and to Have Judgment En- tered in Accordance With Its Motion for Directed Verdict by:	
General Petroleum Corporation	385
Richfield Oil Corporation	374
Shell Oil Company	396
Standard Oil Company of California	378
Tide Water Associated Oil Company	381
Union Oil Company of California	391
Motion for Judgment N.O.V. Under F.R.C. Rule 50(b) (The Texas Co.)	387
Motion for Mistrial	181
Appendix A	182
Appendix B	183

INDEX	PAGE
Motions for New Trial by:	
General Petroleum Corporation	453
Richfield Oil Corporation	447
Shell Oil Company	468
Standard Oil Company of California	436
The Texas Company	440
Tide Water Associated Oil Company	456
Union Oil Company of California	462
Motion to Produce Under Rule 34, Filed August 27, 1953	56
Appendix A	57
Affidavit of Burdell, Charles S.	75
Affidavit of Ferguson, W. H.	93
Motion to Produce Under Rule 34, Filed April 6, 1954	113
Motion and Request of The Texas Co. for the Submission of Written Interrogatories to the Jury	331
Motion to Strike, Filed May 11, 1955	184
Appendix A	185
Appendix B	186
Motion to Strike, Filed June 7, 1955 (Union Oil Co.)	326
Appendix A	328
Motion to Strike Affidavits and Motion for Ex- tension of Time to File Counter-Affidavits ...	502

INDEX	PAGE
Motion to Strike Certain Documents (Shell Oil Co., Inc.)	278
Motion to Strike Certain Evidence by:	
Richfield Oil Corporation	354
The Texas Company	355
Tide Water Associated Oil Company	350
Motion to Strike Certain Exhibits by:	
General Petroleum Corporation	274
Richfield Oil Corporation	280
Shell Oil Company	277, 317
Tide Water Associated Oil Company	279
Motion to Strike Evidence Relating to Declarations and Admissions of Alleged Co-Conspirators (Part I)	187
Motion to Strike Evidence Relating to Acts and Conduct of Alleged Co-Conspirators (Part II)	238
Motion to Strike Evidence Remote in Point of Time to the Alleged Cause of Action	265
Motion to Strike Exhibits Offered to Establish Hearsay Statements Therein Contained	177
Schedule A	179
Notice of Appeal by:	
General Petroleum Corporation	535
Richfield Oil Corporation	532
Shell Oil Company	533
Standard Oil Co. of California	534

INDEX	PAGE
Notice of Appeal by—(Continued):	
The Texas Company	533
Tide Water Associated Oil Company	535
Union Oil Company of California	531
Notice to All Defendants That Items Listed for Production Are the Same in Each Motion to Produce Served Upon All Defendants	97
Objections of Defendant, Shell Oil Co. to Plain- tiff's Motion to Produce Under Rule 34, and Motion Seeking Protective Order, or Orders .	114
Objections of Defendants, Standard Oil Co. of Calif., The Texas Co., Richfield Oil Corp., General Petroleum Corp., Tide Water Asso- ciated Oil Co. and Union Oil Co. of Calif. to Plaintiff's Motion to Produce Under Rule 34 and Motions Seeking Protective Order or Orders	98
Objections to Requests for Instructions Made by Plaintiff and Defendants Other Than The Texas Co.	310
Order Denying Defendants' Motions to Have the Verdict and Judgment Herein Set Aside and to Have Judgment Entered in Accordance With Motions for Directed Verdict or for a New Trial	529
Order Extending Time for Filing Record and Docketing Appeals	543

INDEX	PAGE
Order Granting Motion to Add Additional Party Defendant	112
Order on Plaintiff's Motion Directing Addi- tional Defendant Shell Oil Co. to Produce Under Rule 34	121
Order on Plaintiff's Motion to Produce	106
Renewal of Motions of Defendants	336
Renewal of Motions by General Petroleum Cor- poration	338
Request for Admissions:	
General Petroleum Corporation	145, 151
Richfield Oil Corporation	139
Shell Oil Company	148
Standard Oil Company of California	130
The Texas Company	136
Tide Water Associated Oil Company	142
Union Oil Company	133
Requested Instructions of The Texas Company .	290
Requested Instructions, Additional of Shell Oil Company	302
Requested Instructions of Standard Oil Co. of Calif., General Petroleum Corp., Tide Water Associated Oil Co., Richfield Oil Corp., Shell Oil Co., Inc. and Shell Oil Co.	284
Requested Instructions, Supplemental of Stand- ard Oil Co. of Calif., General Petroleum Corp., Tide Water Associated Oil Co., Richfield Oil Corp., Shell Oil Co., Inc. and Shell Oil Co. ...	307

INDEX	PAGE
Requested Supplemental and Substitute Instructions of Standard Oil Co. of Calif., General Petroleum Corp., Tide Water Associated Oil Co., Richfield Oil Corp. and Shell Oil Co. .	362
Requested Supplemental and Substitute Instructions of Standard Oil Co. of Calif., General Petroleum Corp., Tide Water Associated Oil Co., Richfield Oil Corp., Shell Oil Co., Inc. and Shell Oil Co.	313, 362
Second Requested Supplemental and Substitute Instructions of Standard Oil Co. of Calif., General Petroleum Corp., Tide Water Associated Oil Co., Richfield Oil Corp. and Shell Oil Co.	359
Statement of Points on Appeal, Supplemental, by The Texas Co.	7688
Stipulation That Exhibits May Be Considered in Their Original Form	7686
Stipulation Re Order on Plaintiff's Motion to Produce	129
Transcript of Proceedings at Hearing on Right of Plaintiff to Obtain Equitable Relief	7597
Transcript of Proceedings on Plaintiff's Motion to Strike Affidavits or for Extension of Time to File Counter-Affidavits	7601
Transcript of Proceedings Re Presentation of Order Carrying Into Effect the Court's Rulings on Plaintiff's Motions to Produce ...	7640

INDEX

PAGE

Transcript of Various Proceedings, Re Motions of Defendants to Have the Verdict and Judgment Set Aside and to Have Judgment Entered in Accordance With Motions for Directed Verdict and Motions of Defendants for New Trial	7618
Transcript of Proceedings of Trial	545
Closing Argument of:	
General Petroleum Corporation .	7133, 7158
Richfield Oil Corporation	7325, 7374
Shell Oil Company	7077
Standard Oil Company of California ..	7005
The Texas Company	6946, 6992
Tide Water Associated Oil Co. .	7188, 7228
Union Oil Company of California	7285
Closing Argument of Plaintiff	7395, 7447
Court's Instructions to the Jury and Exceptions Noted Thereon	7488
Opening Argument by Plaintiff	6767, 6897
Witnesses, Defendants':	
Agostino, Donald E. (Deposition)	
—direct	6531, 6627
Burnham, Alan B.	
—direct	4979
—cross	4993, 4994
—redirect	4995
—recross	4995

INDEX

PAGE

Witnesses, Defendants'—(Continued)

Butterworth, L. Mark

—direct	5867
—cross	5901, 5917

Campbell, Gordon D.

—direct	5917, 5923
—cross	5945
—redirect	5956

Cardoza, J. D.

—direct	5448, 5471
—cross	5473

Carter, W. R.

—direct	4807, 4833, 4912, 6501
—cross	4897, 4899, 4906, 4976, 6502
—redirect	4974
—recross	4977, 5256

Divine, James

—direct	4591
—cross	4592

Dootson, James T.

—direct	6447
—cross	6458, 6466, 6490

Douglas, Harold Barton, Jr.

—direct	5527, 5545
—cross	5590, 5591, 5595
—redirect	5628, 5631
—recross	5630

INDEX

PAGE

Witnesses, Defendants'—(Continued)

Ervin, Walter L.

—direct	4672, 4693
—cross	4738, 4779, 4791
—redirect	4791
—recross	5003

Falkner, H. Joseph

—direct	5993
—cross	6009, 6011
—redirect	6023

Foster, James Taylor

—direct	5637
—cross	5675, 5705
—redirect	5717, 5719
—recross	5718

Frank, Raymond William

—direct	5632
—cross	5634

Gray, David E.

—direct	6177, 6200
—cross	6202

Harder, Frank J.

—direct	5417
—cross	5425
—redirect	5434

Held, Lawrence

—direct	5962
—cross	5971, 5973, 5974

INDEX

PAGE

Witnesses, Defendants'—(Continued)

Hock, Anthony A.

—direct	5396
—cross	5408
—redirect	5415
—recross	5416

Horn, Albert E., Jr.

—direct	6027, 6051, 6052, 6073
—cross	6050, 6085
—redirect	6079
—recross	6084, 6085

Irby, Thomas R.

—direct	5961, 5976
—cross	5962, 5984

Jayne, F. M.

—direct	5186, 6087
—cross	5207, 5224, 6092, 6093
—redirect	5245

Kesner, Kay Louise

—direct	6217
---------------	------

Lane, James F., Jr.

—direct	4997, 5013
—cross	5025

Manlowe, Lewis J.

—direct	6395, 6428
—cross	6433, 6435
—redirect	6437
—recross	6438, 6439, 6439, 6440

INDEX

PAGE

Witnesses, Defendants'—(Continued)

Manlowe, Lewis J. (Deposition)

—direct 6512

Martin, W. I.

—direct 6221, 6235

—cross 6301, 6302, 6337

—redirect 6382

—recross 6386

Maxwell, Horace D.

—direct 5121

—cross 5143, 5144, 5147, 5154

—redirect 5155, 5160

—recross 5155, 5157, 5158, 5159

McAfee, Sidney

—direct 6157

—cross 6165

Mifflin, Wesley J. (Deposition)

—direct 6167

Moore, George F.

—direct 5516, 5521, 6390

—cross 5520

Muckley, Joseph E.

—direct 6399

—cross 6407, 6408

—redirect 6425

	INDEX	PAGE
Witnesses, Defendants'—(Continued)		
Nestrud, M. J.		
—direct	5058, 5087
—cross	5100
—redirect	5117
Pacheco, Benjamin L.		
—direct	5501
—cross	5514
Paul, Herbert E.		
—direct	4489, 4525, 4538
—cross	4537, 4539, 4540, 4541, 4593, 4619, 4661, 4671
—redirect	4660, 4664, 4670, 4803
—recross	4668, 4795
Ranum, Gordon J.		
—direct	4566
—cross	4589
Reanier, W. A.		
—direct	5477
—cross	5490, 5491, 5500
Reichenbach, W. W.		
—direct	5760, 5794
—cross	5843, 5844, 5852, 5861
—redirect	5862
—recross	5866

INDEX

PAGE

Witnesses, Defendants'—(Continued)

Riley, Grant

—direct	5721
—cross	5742, 5752
—redirect	5754
—recross	5757

Ripley, C. R.

—direct	5033
—cross	5051, 5052
—redirect	5055

Ryan, Jack J.

—direct	5435
—cross	5443

Sidford, James P.

—direct	6096
—cross	6126
—redirect	6153, 6156

Smith, Donald J.

—direct	5263
—cross	5290, 5303
—redirect	5312
—recross	5317

Thompson, Harry A.

—direct	5523
—cross	5526
—redirect	5526

INDEX

PAGE

Witnesses, Defendants'—(Continued)

Venen, Whitney (Deposition)

—direct	5321
—cross	5359
—redirect	5392, 5394
—recross	5392

Wood, Ross F.

—direct	5165
—cross	5180
—redirect	5185

Witnesses, Plaintiff's:

Adams, Brockman

—direct	3703
—cross	3711
—redirect	3711

Bode, Charles J.

—direct	3879, 3953, 4027
—cross	4045

Bovee, David G.

—direct	2856
—cross	2875, 2885
—redirect	2886
—recross	2892

Brady, John W.

—direct	1993
—cross	2035, 2038, 2041, 2043, 2044
—redirect	2045

INDEX

PAGE

Witnesses, Plaintiff's—(Continued)

Buckley, Edmund D.

—direct2209, 2280, 2301

Burd, Henry A.

—direct4355, 4384

—cross4397,
4403, 4417, 4420, 4438, 4442, 4444

Burnham, Alan B.

—direct3771

Cardoza, J. D.

—direct2309, 2383, 2467,
2536, 2599, 2613, 2726, 2746, 3218, 3296

—cross2592, 2595, 2596, 3336

—redirect2752

De Pue, Paul

—direct6576

—cross6583

—redirect6593

—recross6593

Douglas, Harold Barton, Jr.

—direct2961, 2991, 3057, 3144

—cross3197

Ferguson, William H.

—direct6318

—cross ...6322, 6323, 6327, 6328, 6330, 6331

INDEX

PAGE

Witnesses, Plaintiff's—(Continued)

Garretson, Charles B. (Deposition)

—direct3777, 3779, 3803

—cross3831, 3832

—redirect3833

Giske, Ragnar

—direct4107

—cross4115

—redirect4116

—recross4117

Gorman, P. M.

—direct3836, 4071

Hedlund, Harry R.

—direct3478

Henrye, George A.

—direct1959

—cross1966, 1970, 1971

—redirect1972

Horn, Albert E., Jr.

—direct3873, 4080, 4093

—cross4105

Johnson, Arnold

—direct2112

—cross2129, 2133, 2142, 2145

—redirect2145, 2149

—recross2148, 2149

INDEX

PAGE

Witnesses, Plaintiff's—(Continued)

Kelly, Riley

—direct1786, 1839

—cross1869, 1872, 1877, 1886, 1887

—redirect1893

Klinge, Richard

—direct1926

—cross1953, 1955, 1957

—redirect1958

—recross1959

Kroutwick, Harold

—direct1593

—cross1623, 1625, 1627, 1629

—redirect1632, 1635

—recross1634

Markov, Victor W.

—direct2451

Marsh, William R.

—direct1898, 1905

—cross1909, 1923

—redirect1924

Martin, W. I.

—direct3487,

3505, 3580, 3656, 3712, 3723, 4057

—cross4063

INDEX

PAGE

Witnesses, Plaintiff's—(Continued)

Moore, George F.

—direct	554, 574, 634, 760, 899, 957, 993, 1025, 1050, 6594
—voir dire	572, 649
—cross	1002, 1089, 1099, 1181, 1226, 1290, 1312, 1342, 1371, 1409, 1417, 1471, 1475, 1485, 2227, 6600, 6605
—redirect	1493, 2273, 3680, 3698
—recross	1526, 1536, 3698, 3699

Moore, Mrs. Jeanne P.

—direct	4193
—cross	4225, 4239, 4268, 4269, 4270
—redirect	4272
—recross	4274

O'Neill, Donald B. (Deposition)

—direct	4275, 4320
---------------	------------

Paul, Herbert E.

—direct	2630, 2682, 2757
—cross	2822, 2827, 2830, 2832
—redirect	2847

Pendergast, Joseph E.

—direct	4118, 4157
—cross	4174, 4178, 4181
—redirect	4187
—recross	4191

Witnesses, Plaintiff's—(Continued)

Ranum, Gordon J.

—direct	1635
—cross ... 1661, 1671, 1679, 1701, 1711, 1712	
—redirect	1718, 1732
—recross	1727

Reilly, Harry L.

—direct	3338, 3370, 3424, 3444
—cross	3472, 3474, 3477

Risedorph, Laurence E.

—direct	2051, 2066
—cross	2097, 2103

Rogers, Clarence A.

—direct	4236
---------------	------

Rorvik, Earle O.

—direct	1734
—cross	1752, 1781

Scott, Walter

—direct	2177
---------------	------

Scully, William S. (Deposition)

—direct	4340
---------------	------

Sides, Richard Robert

—direct	2168
—redirect	2173, 2176

INDEX

PAGE

Witnesses, Plaintiff's—(Continued)

Stone, Clarence L.

—direct971, 1004, 1017

—cross1010, 1019

—redirect1022

Stratton, Stanley E.

—direct2896, 2914

—cross2957, 2959

White, J. W.

—direct3759

Wood, Ross F.

—direct3850

—cross3870, 3871, 3872

Undertaking in Lieu of Supersedeas Bond and

Order Thereon 536

Verdict for Plaintiff 369

No. 14928.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BENNY,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,
Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN
TOBACCO COMPANY,

Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,
Appellees.

Appeals From the United States District Court for the
Southern District of California, Central Division.

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PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	1
Specifications of error.....	6
Summary of argument.....	7
Argument	10

I.

Introduction	10
A. The importance and novelty of the case.....	10
B. The nature of burlesque and parody.....	11
C. The history of burlesque and parody.....	14

II.

A true burlesque or parody of a copyrighted work of literature is a fair use and not a copyright infringement.....	21
A. The principle of fair use is well established.....	22
B. The burlesquer and parodist are entitled to the full enjoyment of the right of fair use.....	28
C. The right of fair use for burlesque and parody is consistent with the authorities.....	35
1. The English cases.....	35
2. The American cases.....	39
3. Textbooks and treatises.....	41
D. The burlesque, "Autolight," is a fair use of "Gaslight"	43

III.

The history of the Copyright Act and long-established custom constitute a statutory construction that the burlesquer and parodist have the right of fair use.....	47
Conclusion	51
Appendix :	
Synopsis of Gaslight.....	App. p. 1
Synopsis of Autolight.....	App. p. 4

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Institute of Architects v. Fenichel, 41 F. Supp. 146....	26
Atlantic Monthly Co. v. Post Pub. Co., 27 F. 2d 556.....	50
Becker v. Loew's Inc., 133 F. 2d 889.....	22
Bell v. Whitehead, 8 Law Jour. (N. S.) 141.....	22
Bloom & Hamlin v. Nixon, 125 Fed. 977.....	26, 40
Broadway Music Corp. v. F-R Pub. Corp., 31 F. Supp. 817....	26, 27
Burtis v. Universal Pictures Corp., 40 Cal. 2d 823.....	22
Carlton v. Mortimer, MacGillivray, Copyright Cases, 1917-23, p. 194	36
Carr v. National Capital Press, 71 F. 2d 220.....	27
Caruthers v. RKO Radio Pictures Corp., 20 F. Supp. 906.....	21
Cary v. Kearsley, 170 Eng. Rep. 679.....	22
Chamberlin v. Uris Sales Corporation, 150 F. 2d 512.....	23
Deward & Rich Inc. v. Bristol Savings & Loan Corporation, 120 F. 2d 537.....	50
Dymow v. Bolton, 11 F. 2d 690.....	21
Echevarria v. Warner Bros. Pictures Corp., 12 F. Supp. 632....	21
Farmer v. Calvert Lithographing etc. Co., 8 Fed. Cas. 1022, No. 4651	22
Farmer v. Elstner, 33 Fed. 494.....	25
Fendler v. Morosco, 253 N. Y. 281, 171 N. E. 56.....	22
Fitch v. Young, 230 Fed. 743.....	50
Folsom v. Marsh, 9 Fed. Cas. 342, No. 4901.....	22, 25, 27
Fox Film Corp. v. Doyal, 286 U. S. 123.....	23
G. Ricordi & Co. v. Mason, 201 Fed. 182.....	26, 33
Glyn v. Western Feature Film Co., Ltd., 1 Ch. 261, 114 L. T. Rep. 354	35, 37
Green v. Luby, 177 Fed. 287.....	40
Green v. Minzensheimer, 177 Fed. 286.....	40

	PAGE
Gropper v. Warner Bros., 38 F. Supp. 329.....	22
Hanfstaengl v. Empire Palace, 70 L. T. Rep. (N. S.) 854.....	37
Harold Lloyd Corp. v. Witwer, 65 F. 2d 1.....	21
Hartford Printing Co. v. Hartford Directory & Pub. Co., 146 Fed. 332	27, 41
Henry Holt & Co. v. Liggett & Myers Co., 23 F. Supp. 302.....	30
Hill v. Whalen & Martell, Inc., 220 Fed. 359.....	25, 27, 33, 39
Karll v. Curtis Pub. Co., 39 F. Supp. 836.....	26, 27
King Features Syndicate v. Fleischer, 299 Fed. 533.....	39
Kustoff v. Chaplin, 120 F. 2d 551.....	21
Lawrence v. Dana, 15 Fed. Cas. 26, No. 8136.....	25, 27
Leon v. Pacific Tel. & Tel. Co., 91 F. 2d 484.....	41
Martinetti v. Maguire, 16 Fed. Cas. 920.....	23
Maxwell v. Goodwin, 93 Fed. 665.....	21
Mazer v. Stein, 347 U. S. 201.....	22, 23
Nichols v. Universal Pictures Corp., 45 F. 2d 119.....	21
Roe-Lawton v. Hal E. Roach Studios, 18 F. 2d 126.....	21
Sayre v. Moore (Eng., 1785), 1 Easts Reports 359.....	46
Schwarz v. Universal Pictures Corp., 85 F. Supp. 270.....	21
Shapiro, Bernstein & Co. v. P. F. Collier & Co., 26 U. S. P. Q. 40	26, 27
Simms v. Stanton, 75 Fed. 6.....	26, 27
United States v. Farrar, 38 F. 2d 515.....	49
United States v. Paramount, 334 U. S. 131.....	23
United States v. State Bank of North Caroline, 6 Pet. 29.....	49
Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc., 216 F. 2d 945.....	22, 23, 30, 48
Warren v. White and Wyckoff Mfg. Co., 39 F. 2d 922.....	27
Wells Fargo & Co. v. Mayor and Alderman of Jersey City, 207 Fed. 871.....	49

	PAGE
Wheaton v. Peters, 8 Pet. 591.....	22
White-Smith Pub. Co. v. Apollo Co., 147 Fed. 226, aff'd 209 U. S. 1.....	22, 48, 50
Wiren v. Schubert Theatre Corp., 5 F. Supp. 358.....	21

MAGAZINES

Life, May 22, 1944.....	45
Scribners (1904), Introduction, Carolyn Wells, A Parody Anthology	11
Time, May 22, 1944.....	45

STATUTES

Act 8 Anne, Chap. 19.....	10
Act of August 18, 1856 (9 Stat. 106).....	10
Act of May 31, 1790 (1 Stat. 124).....	10
Lytton Act, 3 and 4 Will. 4, Chap. 15.....	10
United States Code Annotated, Title 17, Sec. 1.....	31
United States Code, Title 28, Sec. 1338(a).....	1
United States Code, Title 28, Sec. 1291.....	1
United States Constitution, Art. I, Sec. 8.....	7, 22

TEXTBOOKS

50 American Jurisprudence, Secs. 319-320, p. 309.....	49
Angle & Miers, The Living Lincoln, Rutgers Press, 1955, p. 86..	13
ASCAP Copyright Law Symposium, No. 6, p. 43, Cohen, Fair Use in the Law of Copyright.....	24, 26
Baddeley, Burlesque Tradition in the English Theatre (London, 1952)	15
33 Canadian Bar Review (1955), pp. 1130, 1131, Parody and Burlesque in the Law of Copyright.....	14, 34
33 Canadian Bar Review (1955), p. 1154, Yankwich, Parody and Burlesque in the Law of Copyright.....	34

	PAGE
Cohen, Fair Use in the Law of Copyright, p. 54.....	42
45 Columbia Law Review, pp. 503, 511, Chafee, Reflections on the Law of Copyright.....	23
13 Corpus Juris, pp. 1113, 1118.....	41
De Wolf, Outline of Copyright Law, pp. 97, 142.....	42
Falk, American Literature in Parody, Twayne, 1955, p. 14....14, 18	
Falk, American Literature in Parody, pp. 77, 115.....	21
Howell, The Copyright Law, pp. 253, 260.....	23
Kitchin, Survey of Burlesque and Parody in English, Oliver & Boyd, 1931, pp. xx-xxiii.....	11, 12, 14, 15, 50
Lindey, Plagiarism and Originality, p. 43.....	42
Shepperson, The Novel in Motley, Harv. Univ. Press, 1936, pp. 4-8.....	11, 12, 15, 16, 17, 18, 19, 49
Spring, Risks and Rights, pp. 177, 183, 186.....	42
22 University of Chicago Law Review, pp. 213, 215, Yankwich, What Is Fair Use?.....	26, 27
22 University of Chicago Law Review, pp. 203, 208-209, Yank- wich, What Is Fair Use?.....	33
Weil, Copyright Law, p. 432.....	33, 42

No. 14928.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BENNY,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,
Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN
TOBACCO COMPANY,

Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,
Appellees.

Appeals From the United States District Court for the
Southern District of California, Central Division.

BRIEF OF APPELLANTS.

Jurisdiction.

This is an action for copyright infringement. Jurisdiction of the district court was invoked under 28 U. S. C. Sec. 1338(a) on the ground that this cause arises under the Copyright Laws of the United States. [R. 3, 36.] Judgment was entered May 23, 1955. [R. 88-91.] Notice of Appeal was filed June 21, 1955. [R. 91-92.] This Court has jurisdiction under 28 U. S. C. Sec. 1291.

Statement of the Case.

Pleadings. This is an action for copyright infringement in which appellee seeks to enjoin appellants from the performance of a parody or burlesque of appellee's

copyrighted motion picture "Gaslight." The complaint also contained a count for unfair competition. No damages were asked. [R. 1-25.] A temporary restraining order was granted against the production and performance of the purported infringing work entitled "Autolight" [R. 10], and, as subsequently modified [R. 25], it remains in effect. Appellants filed answers [R. 28-43] which denied the infringement but admitted that in 1952 appellant Columbia Broadcasting System (CBS) had produced, appellant American Tobacco Company had sponsored, and appellant Benny had performed a burlesque of "Gaslight," and that the defendant proposed to remake the burlesque under the title "Autolight" on film and televise it in the future. The answers set up as affirmative defenses the claim that "Autolight" was an original burlesque of "Gaslight," that the use made of the motion picture was a fair use and not a copying, and that the burlesque did not and would not detract from the picture or satisfy in whole or in part any demand for the picture.

Evidence. The case was tried upon a stipulation of facts [R. 47-75], exhibits, and the testimony of one witness, Dr. Frank C. Baxter of the English Department of the University of Southern California. [R. 111-188.] The stipulation shows that in 1944 appellee Loew's had produced, copyrighted, and released an hour-and-forty-minute feature motion picture under the name of "Gaslight." The motion picture, which featured Charles Boyer, Ingrid Bergman, and Joseph Cotten, was based upon a play variously called "Gaslight" or "Angel Street," written by appellee Hamilton. The picture was produced at a cost of \$2,500,000 and exhibited to approximately 25,000,000 people in America and 27,000,000 people

abroad. Its domestic showing was concluded in 1946. The picture [Ex. 2] was viewed by the Court.

In 1945, appellant Jack Benny, a well known radio and television comedian, had presented on his radio program a burlesque or parody of the motion picture "Gaslight" in which appellees cooperated to the extent of furnishing a print of the picture so that the studio audience (which in this case was an Army group) could see the picture before attending the broadcast. A recorded transcription and a script of that broadcast were introduced as Exhibits 6 and 7. On January 27, 1952, Miss Barbara Stanwyck and Benny were featured in a live television skit on the Benny program which was a burlesque of the motion picture "Gaslight." The television broadcast had been contemporaneously filmed (a "television kinescope recording"), and the recording was introduced in evidence as Exhibit 8 and was viewed by the Court. A copy of the script was introduced in evidence as Exhibit 9. Loew's thereafter notified CBS of its objection to the television broadcast as an infringement of its copyright. CBS took the position that the broadcast was a burlesque or parody which did not infringe Loew's copyright.

In early 1953, CBS and Benny determined that one of the Benny television programs for the 1953-1954 series, would be a filmed reproduction of the 1952 live broadcast of the parody or burlesque of "Gaslight."* A print

*Loew's learned of the proposal through a trade paper announcement and immediately sought and secured the restraining order against the production or performance of the parody or burlesque. Since so much had already been invested in preparation for the program (about \$60,000), the Court modified its restraining order to permit its filming and printing, but restrained the proposed use as a television broadcast pending trial of the action.

of the filmed reproduction was introduced in evidence as Exhibit 10 and was viewed by the Court. A copy of the script used in its making was introduced as Exhibit 11.

Dr. Baxter's testimony at the trial was that of an expert in the field of literature and especially parody and burlesque. Also introduced in evidence as exemplars of Benny's custom were scripts of some of his radio burlesques of other pictures [Exs. 4A-4D, incl.] and the "cutting continuity" of the particular motion pictures so burlesqued [Exs. 5A-5D, incl.]. Certain literary works were also introduced [Exs. 16-17].

The Works Involved. In the Appendix hereto, there is set forth a synopsis of the motion picture "Gaslight" and of the allegedly infringing parody or burlesque, "Auto-light." However, in any copyright infringement case the ultimate comparison must be between the very works themselves. The nature of the issue here makes this even more important than in most infringement actions. Neither scripts nor synopsis—nor the description of opposing counsel or expert witnesses—can begin to give a true picture. For that reason, appellants will make the necessary arrangements in order that this Court may view the works at its convenience.

Opinion of the Trial Court. After the matter had been submitted and briefed, Trial Judge Carter rendered an opinion for the plaintiff on May 6, 1955. This opinion

is reported in 131 F. Supp. 165.* In his opinion Judge Carter concluded "that parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, *i.e.*, what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists." 131 F. Supp. at 183. On this question of fact, the Trial Court held that "If this was the ordinary plagiarism case, without the defense of burlesque as a fair use, it would be crystal clear, under the controlling authorities, that there had been access, a substantial taking and therefore infringement." 131 F. Supp. at 172. Judge Carter held that the parody or burlesque was not authorized under the doctrine of fair use, which he said should be given very narrow scope if the use was solely for "commercial gain." 131 F. Supp. 173-176, 183. The burlesquer or parodist, under the holding of the Trial Court, may lawfully use an "isolated incident, character, event, theme or setting" from the original, but he may not use "the whole or a substantial part of the copyrighted material." 131 F. Supp. at 185.

Findings, Conclusions, and Judgment. Findings of fact, conclusions of law, and judgment were entered on May 20, 1955. [R. 76-91.] The Court found [F. VIII

*Through inadvertence, the opinion was omitted from the printed Record. It is being printed as a Supplement to the Record but the printing is not yet completed. Citations herein will be to pages of the Federal Supplement.

and XII] that both the 1952 and proposed 1953 burlesque television programs were copied in substantial part from the motion picture "Gaslight" and that the copying was not a fair use, nor made fair by reason of the fact that the material was used in the creation of a burlesque or parody [F. XV]. It concluded [C. 2] that this was an infringement of copyright. The court found no unfair competition. The judgment [R. 88] enjoined the further performance of both television programs and ordered that the prints thereof be delivered up to the Clerk for destruction. The count for unfair competition was dismissed. No attorneys' fees were ordered.

Specifications of Error.

1. The Court erred in finding that the television programs [Exs. 8 and 10], or either of them, were copied by defendant CBS in substantial part from the motion picture photoplay "Gaslight."
2. The Court erred in finding that any part of the said motion picture appearing in said television programs, or either of them, was a substantial part of said motion picture.
3. The Court erred in finding that the copying and use by defendants of the copyrighted material of plaintiff was not or is not a fair use of such material.
4. The Court erred in finding that any such copying or use was not made fair by reason of the fact that said material was used by defendants in the creation of a parody or burlesque.
5. The Court erred in concluding that defendants had infringed plaintiff's copyright.

Summary of Argument.

I.

Burlesque and parody have a long and honorable history as useful arts. From the time of the Greeks, the greatest works of art and literature have been regularly burlesqued or parodied by other leading artists or writers. Since 1741 when Sir Henry Fielding's *Shamela* made sport of Samuel Richardson's *Pamela*, few books or dramas in English have escaped the humorous thrusts of eminent burlesquers and parodists such as Thackeray, Bret Harte, Weber and Fields, Thurber, and Corey Ford. Although burlesque and parody are well established traditions in every field of art, this is the first case squarely presenting the question whether a copyright holder can prevent the use of his protectible material in the independent creation of a burlesque or parody of the copyrighted work. This is a question of immense practical importance, for the survival—at the very least, the vigor—of the literary art of burlesque and parody is dependent upon the decision.

II.

A. The power of Congress to enact copyright legislation is subject to the command that only such rights may be granted as will, in the words of the Constitution, "promote the Progress of Science and useful Arts" (Art. I, Sec. 8). Reflecting that fact, a copyright holder does not acquire the right to prevent uses of his work which promote the progress of science and the useful arts for the

public benefit. This well-established doctrine of "fair use" is illustrated in a number of types of cases. Closely analogous to the case at bar is the right of literary critics and reviewers to make a fair use of protectible material in their work. While various factors are involved in determining what is a "fair use," the unifying element is the constitutional provision under which courts approve bona fide uses of copyrighted material in connection with the dissemination of knowledge or the forwarding of a useful art.

B. Burlesque and parody are entitled to the full benefits of the doctrine of fair use. They constitute a useful art, for they are a kind of literary criticism and they also entertain. In the creation of a burlesque or parody just as in literary criticism, the use of a pre-existing work is absolutely essential, for the burlesque or parody has no point unless there is an "original" to be compared and contrasted. Since practically all fair uses (including literary criticism) result in financial gain to the author, the fact that burlesques and parodies are written for money is no barrier to the right of fair use. Nor can the story line automatically be excluded from the permissible fair use, for use of it may be reasonably necessary for the creation of the new and independent work, as it often is in literary criticism.

C. Although the issue presented here has never before been squarely decided, the English and American cases which have adverted to the question of burlesque and parody recognize the right of fair use for that purpose.

American textbooks and treatises also uphold the right of fair use for the parodist and burlesquer.

D. The burlesque "Autolight" is a fair use of "Gaslight." The authors of "Autolight" necessarily had to use the recognizable elements of "Gaslight" but they took no more than was appropriate for their purpose. In using the bare bones of "Gaslight," "Autolight" used much less than did the contemporaneous reviews in periodicals, and indeed much less than many of the burlesquers in literary history have used of their "originals." The resulting burlesque was a new, independent, and completely different literary work in the field of a useful art.

III.

The Federal Copyright Act of 1790 has been repeatedly amended to expand the protection given to writers and other artists. However, Congress has never acted to prevent the publicly accepted custom of burlesque and parody of copyrighted works, and this congressional acquiescence is a clear indication that Congress had no intention of preventing such custom. Among people in the literary field, there has also been widespread acquiescence in the understanding that the burlesquer and parodist have a right to a fair use of protectible material. This acquiescence constitutes an interpretation of the statute which is entitled to substantial weight.

ARGUMENT.

I.

Introduction.

A. The Importance and Novelty of the Case.

The opinion of the trial court states that "The case presents novel questions in the law of literary property and is a case of first impression. It presents a major issue. . . ." 131 F. Supp. at 167. That issue is: Does the legal monopoly created by the Copyright Act include the right in the copyright proprietor to prohibit or control the use of his otherwise protectible material in the independent creation by another author of a burlesque or parody of the copyrighted work?

This is the first time that this issue has been squarely presented for reported court decision in either the United States or England. This is true despite the fact that the distinct form of literary art which we call burlesque or parody is more than 2000 years old and the fact that since the invention of printing there has been an increasing number of published burlesques and parodies directed toward particular literary works. Although authors of books have been given copyright protection in England since 1719* and in America since 1790** and authors of plays have had the same protection in England since 1833*** and in America since 1856,**** nevertheless the question presented here has never before been decided.

*Act 8 Anne c. 19.

**Act of May 31, 1790; 1 Stat. 124.

***Lytton Act, 3 and 4 Will. 4, c. 15.

****Act of Aug. 18, 1856; 9 Stat. 106.

The importance of the issue is very great. While the particular case involves the burlesque or parody of a motion picture by a television program, the issue is vastly broader. Parody and burlesque cover the whole field of arts—novels, short stories, plays, poetry, non-fictional works, essays, treatises, the graphic arts as represented by cartoons and caricatures, even music. In each class we find an established tradition of burlesquing original creations, and the burlesquer inevitably uses substantially more of the original than he could otherwise legitimately borrow were he creating a new work of the same type as that of the original. This case raises the vital question: How far at this late date ought that tradition be curbed by the courts?

Essential to a resolution of this novel and important issue is a familiarity with the nature of burlesque and parody, and their long history as art forms. Thus, as a background for the legal argument, we turn to these matters.

B. The Nature of Burlesque and Parody.

Burlesque and parody constitute a wide *genre* lying within the realm of comedy and covering all of the arts.* The essence of this *genre* is that the artist seizes upon some well known "original" and through distortion, in-

*There is little purpose to be served in pursuing the differentiation, if any there be, between "burlesque," "parody," and "travesty." The scholars themselves have not settled upon a definition of the terms. Dr. Baxter's definitions are found at R. pp. 113-115; see R. pp. 147-152. For other definitions, see Shepperson, "The Novel in Motley," Harv. Univ. Press. 1936, pp. 4-8 (hereinafter cited as "Shepperson"), Kitchin, "Survey of Burlesque and Parody in English," Oliver & Boyd, 1931, pp. xx-xxiii (hereinafter cited as "Kitchin"), Carolyn Wells, "A Parody Anthology," Scribners 1904, Introduction.

version, exaggeration, and the application of the art of inducing mental contrast turns the seriousness of the original into laughter. The Encyclopaedia Britannica defines the *genre* as “a form of the comic in art, consisting broadly in an imitation of a work of art with the object of exciting laughter, by distortion or exaggeration, by turning, for example, the highly rhetorical into bombast, the pathetic into mock-sentimental, and especially by a ludicrous contrast between the subject and the style.”

Broadly speaking, the original may be anything—an institution (*e.g.*, the church, the state, a political party); a philosophy, religion or belief; mankind itself. From such wide generalities, the artist may range in his selection of the “original” down to the very particular—an individual person, a special event, or a particular work of art or literature. This type of comedy is found in all arts. There are burlesques in music, in painting, in sculpture, and of course in literature and the drama.

There are certain essentials for a literary burlesque or parody. By definition there must be an “original.”* [R. 114.] The original almost inevitably must be serious, or at the very least, take itself seriously, because the burlesquer produces his comic literary result by mental contrast. Equivalently, the original must be known to the burlesquer’s literary audience if the burlesque or

*Where the “originals” are selected from the fields of literature or drama, the burlesques or parodies may be of two subclasses: (1) *general*, as of a school or type of writing or of the style or general type of writing of a particular author, or (2) *particular*, directed at a specific work of a specific writer. Shepperson, p. 7; Kitchin, p. xxii. This case, of course, involves a “particular” parody or burlesque, and the use of the words “burlesque” or “parody” herein refers to a work in which the original is a specific literary creation of a specific author.

parody is to be effective as a burlesque.* Consequently, the original is almost invariably a work currently familiar, including in that term the eternal classics.

The art of the burlesquer or parodist is first to recall to the mind of his audience the original with all of its seriousness and especially the particular traits of the original at which he aims his burlesque. He does this by the use of one or more, or all, of such elements of the original as the title (usually comicalized), setting, characters, style, "message," important incidents, story line, "treatment and development," climax, and any other distinctive features of the original. He does not *take* these elements as his own. Quite the contrary. He tries in every way to impress on his audience that *these* belong to the author of the original. He says in effect, "Remember, this is what the author of the original did; recall the effect it had upon you."

Then the burlesquer, by the application of his own creative talents, by means of distortion, inversion and exaggeration (often, if not usually, including slapsticks) and all the other comic arts, *transforms* that effect into

*This is not a requirement imposed by some abstruse scholar. About a year after Poe's "Raven" was first published, a country lawyer in Springfield, Illinois, received a parody of that poem from a friend. He replied in part:

"April 18, 1846.

"Friend Johnston:

"Your letter, written some six weeks ago, was received in due course, and also the paper with the parody. It is true, as suggested it might be, that I have never seen Poe's 'Raven,' and *I very well know that a parody is almost entirely dependent for its interest upon the reader's acquaintance with the original.* . . .

"Yours truly,

A. Lincoln"

("The Living Lincoln", ed. Angle & Miers, Rutgers Press, 1955, p. 86.)

its exact opposite. And what makes the result funny—and hence effective—is *not simply the additions* which the burlesquer has provided in the way of isolated comic tricks, but *it is the very act of the transformation* of that particular original with its particular tone and effect into something so different. The accomplishment of that transformation in the minds of his audience is the burlesquer's art.

A burlesque or parody is not solely and simply a humorous work. It is inevitably a critique of the original. By making certain aspects of the original laughable, it causes the audience to have some mental question as to whether those traits were really as serious and solemn as they seemed. It is not always intended as "literary criticism" (although it often is); nor is it always destructive or so intended (for it usually is not), but it causes the reader to take a second look at the object burlesqued. Its nature as criticism in this sense is acknowledged by all authors.*

C. The History of Burlesque and Parody.

Knowledge of the art in ancient times is of course fragmentary, although we know it existed from the early

*Dr. Baxter so testified [R. 144] Kitchin declares (p. ix) that "burlesque as [is] a serious art, a long-established mode of criticism, which is often far more incisive, and certainly more economical than the heavy review to which the public has been accustomed since the days of Dryden." Professor Falk states, "Parody is both a form of literary humor and a branch of criticism." ("American Literature in Parody," Twayne, 1955, p. 13.) Judge Yankwich says, "In essence, both parody and burlesque are criticisms. . . ." ("Parody and Burlesque in the Law of Copyright," 33 Canadian Bar Rev. 1130, 1131 (1955).)

days of Greek literature.* Furthermore, as might be expected, until the invention of printing and consequent wide dissemination of books, burlesques were mainly of generalities, such as institutions, beliefs, people, and the like. There were few familiar "originals" in literature to burlesque. But beginning in the 18th century the type of burlesque here under scrutiny—the type which selects a particular work as its original and applies to the *protectible* elements in that work the peculiar art of the complete transmutation of those elements into something entirely new and delightfully comic—came into its own and has progressively burgeoned ever since.

The earliest famous English burlesque of this type remains probably the best. Samuel Richardson's "Pamela" (1740) is usually considered the first English novel. Its general popularity was astounding. In this long work of approximately a thousand pages Richardson tells a story of a poor but virtuous girl who is forced by circumstances to take up a position in the house of Lady B. Lady B's son, Lord B, is a wealthy but completely dissolute young man who has designs upon Pamela's virtue. The entire book consists in the main of a series of letters from Pamela to her mother, describing in detail Lord B's pursuit and her evasion. In fact, someone has said that the book recounts the most sustained attempted seduction in

*There is extensive literature on the subject of burlesque and parody. Excellent works include Kitchin, "Survey of Burlesque and Parody in English," Oliver and Boyd, 1931; Shepperson, "The Novel in Motley; A History of the Burlesque Novel in English," Harvard University Press, 1936; Baddeley, "Burlesque Tradition in the English Theatre" (London, 1952). Judge Yankwich has an excellent short history in his article entitled "Parody and Burlesque in the Law of Copyright," 33 Canadian Bar Rev. 1130 (1955).

literary history. At the conclusion of an involved series of incidents forming the plot, Pamela's virtue triumphs, and Lord B attains his end result only after he has been thus compelled to enter into the bonds of matrimony with her.

If Richardson is considered the first English novelist, his contemporary, Sir Henry Fielding, is often considered the greatest. Fielding was a hard-headed lawyer, subsequently a judge, who had an amazing knowledge of human nature. He was disgusted with the hypocrisy of "Pamela" and in 1741 published anonymously "An Apology for the Life of Mrs. Shamela Andrews," better known simply as "Shamela." It is a little book of approximately 1/20th the length of the original. He used the identical plot and story line, the same cast of characters and the same style of telling his tale by letters from his heroine to her mother as was used by Richardson. However, his heroine, Shamela, was quite the opposite from Pamela; far from being innocent and virtuous she knew quite well the ways of the world (having already been the mother of at least one illegitimate offspring), but she put on mock virtue for the sole purpose of snaring the dissolute young heir, who, by the way, became Lord Booby instead of Lord B. Fielding used Richardson's story; taking off from it he produced a priceless burlesque. As Shepperson says (p. 23), "The letters forming the main body of the burlesque are *an outline of the important scenes and incidents in Pamela*. But the author has been able to alter completely the spirit

and meaning *without changing more than a few of the facts.*"*

While there were many other burlesques and parodies during the 18th century, their number greatly increased in the 19th century. Practically every famous writer was then burlesqued or parodied, and many of the best authors wrote burlesques or parodies of others. In Shepperson's work, he has an appendix-bibliography of 30 pages listing many more than a hundred burlesques of novels in English literature which appeared between 1830 and 1900. We stop here to note only a few of the better known literary burlesques and parodies during this period.

Jane Austen in "Northanger Abbey" (1797) burlesqued the mood, part of the story line and the important incidents in Mrs. Radcliffe's "Romance of the Forest" (1791), and "The Mysteries of Udolpho" (1794). Thackeray wrote a series of "Novels by Eminent Hands" in which he burlesqued Disraeli, Bulwer-Lytton, Lever and others. Thackeray also wrote "A Legend of the Rhine" (1845) as burlesque of Dumas' "Othon l'Archeur" (1840) in which he used the entire story line of the "original," almost incident by incident. M. G. ("Monk") Lewis' famous Gothic romance, "The Monk" (1791), was ridiculed in a burlesque entitled "The New Monk" by "R. S. Esq.," in 1798. By this burlesque, as Shepperson says

*This burlesque receives full discussion in Shepperson's work. Kitchin, after calling "Shamela" probably "our best prose parody," (p. 169) says, "Its cruel cunning lies in the way the author, who perfectly realizes the vulgarity of Richardson's creation, has dogged the footsteps of his victim, using time and again the very language of the original and gently tilting every equivocal situation or speech into downright vice or depravity."

(p. 161), "almost every character and incident of the original is turned into ridicule." Francis Burnand, the famous editor of "Punch," and Henry J. Byron made their living writing parody-burlesques of current popular works. Many of their burlesques were written for the stage.*

Bret Harte has been ranked as one of the "world's best practitioners of the art" of parody and burlesque.** He wrote several series of "Condensed Novels" between 1867 and 1871 burlesquing famous contemporary authors. Three deserve especial mention because, while short, they make extensive use of the protectible material of the original. "Miss Mix" is a wonderful burlesque of Charlotte Bronte's "Jane Eyre" in which "Rochester" becomes "Rawjester." All the salient points of the original story are disclosed but with comic twists.*** In "Lothaw" Bret Harte used characters, style, incidents,

*Burnand wrote probably a hundred burlesques and parodies of plays and stories. (See Shepperson, p. 236.) A good example is his burlesque of Douglas Jerrold's "Black-ey'd Susan," (1829, Pub. in "19th Cent. Plays," Oxford Press) which was a famous English melodrama. The burlesque was presented in 1866 under the name of "The Latest Edition of Black-Eyed Susan: or, The Little Bill That Was Taken Up. An Original Burlesque". (Published by S. French & Sons.) An example of one of Byron's many burlesques, is his play "Miss Eily O'Connor" (1861, Pub. T. H. Lacy) which uses the entire story of Dion Boucicault's play "The Colleen Bawn" (1860; Pub. "19th Cent. Plays" Oxford Press.) Byron advertised his work as "Founded on the Great Sensation Drama of the 'Colleen Bawn'". Byron also burlesqued operas and his "La! Somnambula!" (1865, pub. S. French & Sons) uses the full plot of Bellini's opera of the same name which is still performed. It is interesting to note that in Byron's burlesque he three times uses the device of having a bell cord pulled which turns on a shower bath, drenching the unfortunate character hidden in the shower.

**Falk, "American Literature in Parody," Twayne, 1955, p. 14.

***See Shepperson, p. 235; Kitchin, p. 281.

sequence of incidents and story line in a burlesque of Disraeli's "Lothair" (1870). This parody is stated to have been "The most popular of all Harte's comic pieces . . . Like all of his similar works, it is piquant without being malevolent and critical without being dull."* In "Rupert the Resembler" (1902) Harte burlesqued Anthony Hope's "The Prisoner of Zenda" (1894), and included material appearing in Hope's "Rupert of Hentzau." In a comparatively few pages Harte uses the entire plot of "The Prisoner of Zenda," all its principal characters, and practically all of its important incidents but he transforms them into a delightful travesty.

The 19th century was also the high point of burlesque in America. Various minstrel companies frequently burlesqued story lines and incidents of serious dramatic plays. Dramatic burlesque in this country attained its height at the turn of the century with Weber and Fields. As fast as a serious play came out on Broadway, Weber and Fields burlesqued it in their Broadway Music Hall. [R. 142.] There was introduced into evidence in this case as an example of this type of burlesque the script used by Weber and Fields in their production of a travesty on "Arizona" [Ex. 17], the melodramatic Augustus Thomas play [Ex. 16]. This burlesque was produced within a month after the play opened and the burlesque starred such outstanding personages as DeWolfe Hopper, David Warfield, Faye Templeton and Lillian Russell. This Weber and Fields burlesque uses the entire plot line and much of the dialogue of "Arizona," transformed by independent talent into a completely different result.

*See Shepperson, p. 236.

In the 20th century burlesque and parody have prospered with such literary figures as Max Beerbohm, Robert Benchley, S. J. Perlman, Ogden Nash, E. B. White, Wolcott Gibbs and James Thurber leading a distinguished field of humorists specializing in this *genre*. The English author Barry Pain has done a splendid burlesque of A. S. M. Hutchinson's best selling novel "If Winter Comes" (1921) in a little book entitled "If Summer Don't (1922, Fred A. Stokes & Co.),* which spoofs not only the style, but the whole Hutchinson story line and characters. Corey Ford has produced many modern burlesques including one of the popular "autobiography" titled "Cradle of the Deep" by Joan Lowell (1929, Simon & Schuster), in a book called "Salt Water Taffy: Or, Twenty Thousand Leagues Away From the Sea" (1929, G. P. Putnam & Sons), mocking the original chapter by chapter. [R. 138-139.]

There are many anthologies of parody and burlesque. Walter Hamilton, as early as 1888, published a six-volume collection entitled "Parodies of the Works of English and American Authors" (1885), containing about 4,000 parodies, most of them poetic. Other collections include "A Parody Anthology" (1904) by Carolyn Wells (377 pp.), "A Century of Parody and Imitation" edited by Jerrold & Leonard (1913) (391 pp.), and a recent work of Professor Robert Falk of UCLA entitled "American Literature in Parody" (1955) (276 pp.). Many of these are parodies of style rather than content. Furthermore, since much poetry is non-dramatic the parodist has no "story line" to use; however, in many in-

*Mr. Pain assumed the *nom de plume* of "ABCDEF Notsomuchinson."

stances even in poetry the new author uses line after line of the original, changed but slightly in language but in such a deft manner that the whole poem is transformed into the ludicrous, and a perfect parody is created.*

II.

A True Burlesque or Parody of a Copyrighted Work of Literature Is a Fair Use and Not a Copyright Infringement.

The trial court held that “parodized or burlesqued taking is to be treated no differently from any other appropriation” and therefore that if there is “a substantial taking, infringement exists.” 131 F. Supp. at 183. The court thus refused to recognize that the burlesquer and parodist has a right to make a “fair use” of copyrighted material!** This is the basic error of the decision below.

**E.g.* the parody of Longfellow’s “The Day is Done” and Poe’s “Raven” at pages 77 and 115 of Falk’s “American Literature in Parody”.

**There is no occasion to rely on “fair use” unless there *has been* a use of a substantial amount of protectible material. Use of an *insubstantial* amount of protectible material is not actionable regardless of the intent with which it is taken or the use to which it is put. (*Harold Lloyd Corp. v. Witwer*, 65 F. 2d 1 (9th Cir., 1933); *Kustoff v. Chaplin*, 120 F. 2d 551 (9th Cir., 1941); *Dymow v. Bolton*, 11 F. 2d 690 (2d Cir., 1926).) And so far as *unprotected* elements of the work are concerned—such as ideas, situations, themes, locale and settings, the bare basic plots and ordinarily the characters—the copyright owner does not acquire the right to prevent others from using them, however substantial the use may be. (*Nichols v. Universal Pictures Corp.*, 45 F. 2d 119 (2d Cir., 1930); *Dymow v. Bolton*, 11 F. 2d 690 (2d Cir., 1926); *Caruthers v. RKO Radio Pictures Corp.*, 20 F. Supp. 906 (S.D. N.Y., 1937); *Harold Lloyd Corp. v. Witwer*, 65 F. 2d 1 (9th Cir., 1933); *Echevarria v. Warner Bros. Pictures Corp.*, 12 F. Supp. 632 (S.D. Cal., 1935); *Schwarz v. Universal Pictures Corp.*, 85 F. Supp. 270 (S.D. Cal., 1945); *Wiren v. Schubert Theatre Corp.*, 5 F. Supp. 358 (S.D. N.Y., 1933); *Roe-Lawton v. Hal E. Roach Studios*, 18 F. 2d 126 (S.D. Cal., 1927); *Maxwell v. Goodwin*, 93 Fed. 665 (C. C. Ill., 1899); *Gropper v. Warner*

A. The Principle of Fair Use Is Well Established.

The copyright monopoly is not absolute. Regardless of the protection which may otherwise be given a copyright owner against the TAKING, *animus furandi*, of his protectible literary material, he does not acquire the right to prevent USES of that same material which are necessary to promote the progress of science and the useful arts for the public benefit. Application of this principle has been made under what has come to be known as the doctrine of "fair use" which has been recognized "at all times and in all countries."*

In this country, the Federal Constitution makes a right of fair use inherent in every copyright. Copyright is a creature of statute,** and the power of Congress to enact copyright legislation is subject to the command that only such rights may be granted as will "promote the Progress of Science and useful Arts."*** The purpose of the

Bros., 38 F. Supp. 329 (S.D. N.Y., 1941); *Burtis v. Universal Pictures Corp.*, 40 Cal. 2d 823 (1953); *Becker v. Loew's Inc.*, 133 F. 2d 889 (7th Cir., 1943). In *Fendler v. Morosco*, 253 N. Y. 281, 171 N. E. 56 (1930), it is stated that such elements of a copyrighted work are "free as air".

**Farmer v. Calvert Lithographing etc. Co.*, 8 Fed. Cas. 1022, 1026, No. 4651 (C. C. E. D. Mich., 1872); see *Folsom v. Marsh*, 9 Fed. Cas. 342, No. 4901, at 344 (C. C. D. Mass., 1841); *Cary v. Kearsley*, 170 Eng. Rep. 679 (1802); *Bell v. Whitehead*, 8 Law Journal (N. S.) 141, 142 (1839).

**Ever since the decision in *Wheaton v. Peters*, 8 Pet. 591, 661, 1834, it has been settled that "the law of copyright is a creature of statute, and is not declaratory of the common law, and that it confers distinct and *limited* rights, which did not exist at common law". *White-Smith Pub. Co. v. Apollo Co.*, 147 Fed. 226, 227 (2d Cir., 1906), aff'd 209 U. S. 1, 15 (1908). See also *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 346 (1908); *Mazer v. Stein*, 347 U. S. 201, 214 (1954); *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F. 2d 945, 947 (9th Cir., 1954).

***Article I, Section 8 of the Constitution.

Constitution in authorizing Congress to grant rights to authors which had not theretofore existed was to benefit the public generally by stimulating intellectual creation. Reward to the author was to be only of secondary importance and as a means to secure such stimulation.*

Professor Chafee has epitomized the rationale of the doctrine of "fair use" as follows:

"Nobody else should market the author's book, but we refuse to say nobody else should use it. The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book for fifty-six years or any other long period. Some use of its contents must be permitted in connection with the independent creation of other authors. The very policy which leads the law to encourage his creativeness also justifies it in facilitating the creativeness of others." (Chafee, "Reflections on the Law of Copyright," 45 Col. L. Rev. 503, 511.)

**Mazer v. Stein*, 347 U. S. 201, 219 (1954); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127 (1932); *United States v. Paramount*, 334 U. S. 131, 158 (1948); *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F. 2d 945, 950 (9th Cir., 1954). When the Copyright Act received its last general revision in 1909, the House Committee, in reporting the bill, said:

" . . . It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.

" . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . ." (Howell, "The Copyright Law," pp. 253, 260.)

See *Chamberlin v. Uris Sales Corporation*, 150 F. 2d 512 (2d Cir. 1945); *Martinetti v. Maguire*, 16 Fed. Cas. 920 (Cir. Ct. Calif., 1867).

And Mr. Saul Cohen in his article, "Fair Use in the Law of Copyright," has aptly pointed out the relation of the principle to the Constitutional provisions in saying:

" . . . There is also a strong social interest in enriching our culture and stimulating activity of a literary and artistic nature. The purpose of granting copyrights is, in the words of the Constitution, 'To promote the Progress of Science and useful Arts.' To deny writers the fair use of copyrighted materials would have exactly the opposite effect. So, the law has been that a man may make use of the work of another 'for the promotion of science, and the benefit of the public.' " (ASCAP Copyright Law Symposium, No. 6, p. 43, at 49, published by Columbia University Press, 1955.)*

Literary criticism is an important example of a fair use, and it is closely analogous to burlesque and parody. The trial court recognized that "Reviews by so-called critics may quote extensively for the purpose of illustration and comment." 131 F. Supp. at 175. The quotations set forth below are statements of the well-established rule that if copyrighted material is legitimately used for purposes of the criticism, it is a fair use:

" . . . no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the orig-

*This essay, written for the current Nathan Burkan Memorial Competition, contains a discussion of practically all the English and American cases on the subject, including the burlesque and parody cases.

inal work, and substitute the review for it, such a use will be deemed in law a piracy.” (*Folsom v. Marsh*, 9 Fed. Cas. 342, 344, No. 4901 (C. C. D. Mass., 1841)).

“ . . . Thus, great liberty is exercised in permitting a reviewer to make extracts for the purposes of criticism, so long as such extracts are not made as a cover for a republication . . . On the other hand, if the selections are made *animo furandi*, with intent to make use of them for the same purpose for which the original author used them to convey in a different publication the information which he imparted, or to supplant him in his own territory, a small quantity will suffice to render the defendant liable to a charge of piracy. . . .” (*Farmer v. Elstner*, 33 Fed. 494, 496 (C. C. Mich., 1888).)

“A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. . . .” (*Hill v. Whalen & Martell, Inc.*, 220 Fed. 359, 360 (S. D. N. Y., 1914).)

“ . . . Reviewers may make extracts sufficient to show the merits or demerits of the work, but they cannot so exercise the privilege as to supersede the original book. Sufficient may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed. . . .” (*Lawrence v. Dana*, 15 Fed. Cas. 26, 61, No. 8136 (C. C. D. Mass., 1869).)

The reason that a critic may fairly use copyrighted material is that it is essential for him to do so in performing his function. Unless the critic could quote

substantial portions of the protectible property he is criticising, literary criticism would be severely handicapped and the public interest injured.

There are many types of fair use,* and no one definition adequately explains the many types of uses of copyrighted material which have been permitted. "On the whole, the tests [for fair use] are pragmatic," and the court is required to take "into consideration the particular circumstances of each case." Yankwich, "What is Fair Use?", 22 Univ. of Chicago L. Rev. at 213, 215.**

*The courts have recognized numerous types of fair use other than criticism, though none is so closely analogous to burlesque and parody as is criticism. See for example *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836 (E. D. Wis., 1941) (lyrics of the chorus of a copyrighted song written for the Green Bay Packers football team used in a magazine article about the Packers); *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817 (S. D. N. Y. 1940) (thirteen lines of the lyrics from the chorus of a copyrighted song popular when Pearl White was starring in "Perils of Pauline" used in a magazine article about Miss White's death); *Shapiro, Bernstein & Co. v. P. F. Collier & Co.*, 26 U. S. P. Q. 40 (D. C. N. Y., 1934) (ten lines of the lyrics from an eighteen-line chorus of a copyrighted musical comedy song used in a magazine story in which the characters heard these excerpts from the musical comedy over the radio); *Bloom & Hamlin v. Nixon*, 125 Fed. 977 (E. D. Pa., 1903) (complete chorus of a copyrighted work sung as part of an imitation of another singer who had popularized the song.) *American Institute of Architects v. Fenichel*, 41 F. Supp. 146 (S. D. N. Y., 1941) (six copies of one contract form in a copyrighted book of contract forms reproduced and distributed by an architect to certain owners and contractors with whom he was dealing); *G. Ricordi & Co. v. Mason*, 201 Fed. 182 (C. C. N. Y., 1911) (copyrighted opera libretto used to prepare a brief and fragmentary description of the plot and characters of the opera—a synopsis—which was published in a book of opera stories); *Simms v. Stanton*, 75 Fed. 6, 10-11, 17 (C. C. N. D. Cal., 1896) (same breakdown of the divisions of the subject of phrenology published in a copyrighted book was used by another author who published a later book on the same subject).

**See also Cohen, "Fair Use in the Law of Copyright," ASCAP Copyright Law Symposium, No. 6, p. 43.

Essentially what is required in determining whether a particular use is fair is to “strike a scrupulous balance between the right of an author to the product of his creative intellect and his imagination and the right of the public in the dissemination of knowledge and the promotion and progress of science and useful arts which is the constitutional mandate in which the American law of copyright originated.” *Ibid.* at 213-214.

In striking this balance between the author's rights and the public interest in the dissemination of knowledge, courts have emphasized various factors, depending on the type of the copyrighted work and the use made of it. The lack of intent to infringe was held significant in *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817, 818 (S. D. N. Y. 1940). Whether the “use” supersedes the original or materially reduces the demand for it has frequently been deemed decisive. *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (S. D. N. Y. 1914); *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836, 837 (E. D. Wis., 1941); *Folsom v. Marsh*, 9 Fed. Cas. 342, No. 4901 (C. C. D. Mass., 1841); *Lawrence v. Dana*, 15 Fed. Cas. 26, 136 No. 8136 (C. C. D. Mass., 1869); *Shapiro, Bernstein & Co., Inc. v. P. F. Collier & Son, Co.*, 26 U. S. P. Q. 40, 43 (D. C. N. Y., 1934); *Carr v. National Capital Press*, 71 F. 2d 220 (App. D. C., 1934). The fact that the use was merely a “servile copying” and the user did no original work may be controlling. See *Simms v. Stanton*, 75 Fed. 6, 16 (C. C. N. D. Cal. 1896); *Warren v. White and Wyckoff Mfg. Co.*, 39 F. 2d 922 (S. D. N. Y. 1930); *Hartford Printing Co. v. Hartford Directory & Pub. Co.*, 146 Fed. 332 (C. C. D. Conn., 1906).

Although the considerations in determining fair use seem diverse, the unifying element is the Constitutional provision. The Constitution requires that the copyright monopoly leave room for the dissemination of knowledge and the promotion of the useful arts. Under this mandate, the courts have approved where there is a bona fide use of copyrighted material which is necessary for the dissemination of knowledge or the fostering of a useful art.

B. The Burlesquer and Parodist Are Entitled to the Full Enjoyment of the Right of Fair Use.

Useful Art. Burlesque and parody comprise a useful art: They are a kind of literary criticism, for they induce appraisal of the original they burlesque; moreover, they entertain. The public interest in promoting this useful art entitles the author of a bona fide burlesque or parody to claim the broadest right of fair use. His purpose is to create a new work of art. He has no *animus furandi*; he takes nothing to adopt as his own. He does not purport to supersede or substitute for the original or to detract from it by satisfying any demand for its own qualities; on the contrary, by his individual creative efforts he produces something entirely different from the original, something itself new and delightful which has merit, not from what he used, but from what he did with what he used. He benefits from his *own* efforts. He is and should be limited to using such material as is reasonably necessary to accomplish his particular legitimate objective; he cannot use so much that he merely *reproduces* the original and thus destroys or substantially impairs its value. But within those limitations, he is entitled to make the use required by the art-form he is creating.

Use of pre-existing work. Like literary criticism, burlesque and parody of a particular literary work have one essential prerequisite: They *must* use a pre-existing work. In burlesquing the works of others, our most respected authors have used the story lines, incidents and even literal transcriptions of substantial parts of the “original” work. Unless an author has the right to use those elements of the original, this whole field of burlesque and parody must cease to exist as we know it now. The authorities recognize that under the doctrine of fair use previous works may be used for various purposes, even though the use is not indispensable to the creation of an independent work.* *A fortiori*, use of the prior work for purposes of burlesque, as for criticism, is fair because without such use, burlesque and criticism cannot exist.

A reading of even a sampling of the parodies or burlesques mentioned in the foregoing historical section (pp. 14-21) leaves no question but that the authors have used a substantial portion of the protectible material contained in the originals—no question but that they would have been guilty of copyright infringement if they had used the same amount in a serious work. Application of the standard enunciated by the trial court would mean that none of those works should have been written and no similar work can ever be written.

Commercial gain no disqualification. It is no bar to the right of fair use that the burlesque or parody is produced for “commercial gain.” We believe that the trial court demonstrably erred in placing so much weight

*See cases cited, footnote, p. 26.

on that factor. 131 F. Supp. 174-176, 183. Like most literary criticism (which unquestionably has the right of fair use) burlesques and parodies of course are written for "commercial gain." They always have been. Even the Greeks contended for the crowns of laurel which meant financial success. As this Court said in *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System*, 216 F. 2d 945, 950, "Authors work for the love of their art no more than other professional people work in other lines of work for the love of it. There is the financial motive as well."

It is happily true that the financial returns to authors have increased vastly in the past half century with the advent of motion pictures, radio and television. Even our poets no longer inhabit garrets. But that fact does not make their works any the more a purely "commercial" undertaking. Nor does the fact of compensation change the character of burlesque and parody of the particular as an established, unique and desirable branch of the useful arts, entitled to the use of the works of others which it must make to produce its independent artistic creations.*

*Burlesque and parody are distinguishable from the type of use proscribed in *Henry Holt & Co. v. Liggett & Myers Co.*, 23 F. Supp. 302 (D. C. Pa., 1938). There, in a pamphlet advertising Chesterfield cigarettes, the tobacco company included a quotation from a copyrighted scientific treatise in a manner which made it appear that the author of the treatise had consented to the use of his work for advertising purposes. Its use by the tobacco company was not necessary to promote the progress of science or the useful arts as is the case when parody or burlesque uses the burlesqued or parodied work. No attempt was made to use the treatise as a springboard for creating something new in science or art. The use was simply an unauthorized copying of copyrighted material under circumstances and in a manner which afforded no justification for such use.

A “commercial gain” test would make infringement depend wholly on the sale—even the salability—of the particular parody or burlesque rather than on its intent, its nature or its content. A parody printed in the “Saturday Evening Post” for compensation would infringe; the same parody published by the author at his own expense and distributed without charge would not. This, although the Copyright Act deliberately omits the “for profit” qualification as a requirement to establish infringement in the case of books, poems or plays. (Sec. 1, Title 17 U. S. C. A.; see opinion below, 131 F. Supp. at p. 174.)

The circumstance that television may be a potent competitor to motion pictures for the entertainment audience does not affect the application to parody or burlesque of the principles of fair use. The same interest protects the right of the public to view these comic creations at home as protects its right to see them on the stage or to buy them at the book store. Certainly the advent of television did not have the effect of enlarging the author’s monopoly under the Copyright Act so as to permit him to prohibit or control an art previously unfettered.

The “Eternity” decision. There is convincing proof that since the decision in this case, Trial Judge Carter has himself reached the conclusion that the principle of fair use may authorize the parodist or burlesquer to use at least *some* copyrighted material. In September, 1955, some four months after the opinion and judgment in this case, there came on for trial before Judge Carter the *second* case squarely presenting the issue of the right to burlesque or parody a copyrighted work. Columbia Pictures Corporation, the producer of the award-winning

motion picture "From Here To Eternity," sued the National Broadcasting Company for an injunction and damages because of its television broadcast of a burlesque of that motion picture, featuring the well known comedian Sid Caesar and entitled "From Here to Obscurity." On January 5, 1956, Judge Carter entered a judgment in favor of the *defendant*, holding that *this* burlesque was not a copyright infringement.* In his conclusions of law Judge Carter said, "Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued, the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original." [Concl. 7.] However, Judge Carter limited the extent of the doctrine in this type of case by declaring that it could not extend "to the use of the general or entire story line and development of the original with its expression, points of suspense and build up to a climax."

Use of the story line. A rule automatically excluding use of the story line from permissible "fair use" does not make sense either from a legal or a literary standpoint. Almost invariably a criticism or review of a book or motion picture sets forth the story line, and yet, as we have shown, such criticism is uniformly held to be a fair use. Moreover, it has been held that a brief synopsis

**Columbia Pictures Corp. v. National Broadcasting Company*, F. S. While Judge Carter did not file a written opinion, we understand his Findings of Fact and Conclusions of Law will shortly be published in the Federal Supplement. Notice of appeal to this Court was filed by plaintiff Columbia Pictures Corporation on February 2, 1956.

of an opera printed in a book of such synopses does not infringe the copyright in the libretto. (*G. Ricordi Co. v. Mason*, 201 Fed. 182 (S. D. N. Y., 1911.))

Freedom to make a fair use of the story line as well as other portions of copyrighted material is essential to the preservation of burlesque and parody. Some of history's most prominent burlesques used the story lines of their originals. Fielding's "Shamela," Thackeray's "A Legend of the Rhine," Bret Harte's "Miss Mix," Corey Ford's "Salt Water Taffy" and Weber and Fields' whole series of Music Hall skits are well known examples.

Fair use does not depend upon what is used, but rather upon what is done with what is used, and the result it has. Where the purpose is legitimate, the amount taken is not decisive *per se*. Yankwich, "What is Fair Use?", 22 Univ. of Chicago L. Rev. 203, 208-209; Weil, "Copyright Law," p. 432. One writer may take but an incident and so treat it as to be an obvious infringement (*cf. Hill v. Whalen*, the "Mutt and Jeff" case, 220 Fed. 359); another writer like Fielding, Thackeray, Bret Harte, Corey Ford or Weber and Fields may take detailed matters, even dialogue, and it will be no infringement. As Judge Yankwich says:

" . . . It follows that a rigid formula which would apply to parody and burlesque the sole test of substantiality of copying to be determined by similarity of sequence or 'order of events' in story development, and which would disregard all others, finds no support in the literary history of the English-speaking world. More, the use of such a formula would destroy the comic art, so important and rare, of which parody and burlesque are a part." (Leon R.

Yankwich, "Parody and Burlesque in the Law of Copyright," 33 Canadian Bar Rev. 1130, 1154 (1955).)

Use of material in public domain or by consent. The right of fair use is essential to the continuation of parody and burlesque as a useful art. Use of public domain material, as suggested by the trial court (131 F. Supp. at 185) would not give parodies and burlesques the freshness and timeliness which is the key to their effectiveness. Moreover, after the expiration of a 56-year copyright, none but the very greatest classics would survive in the public mind and would thus be available for the art. Even less satisfactory is the trial court's suggestion that parodists and burlesquers use material by authors who have given consent. 131 F. Supp. at 185. Human nature being what it is, authors whose works most need the pin prick of parody would be the least likely to consent.

To limit burlesque use to material in the public domain or by consent would promote neither the useful arts nor the public interest. Freedom of thought is under attack today as it never has been since the Middle Ages. This is no time to suppress or limit forms of art capable of expressing thoughts humorously. We need to preserve those art forms which bless us with a saving balm of clean, hearty laughter. That, the burlesque of the particular has always done and continues to do.

C. The Right of Fair Use for Burlesque and Parody Is Consistent With the Authorities.

While the issue in this case has never been the subject of a square decision by any court, the cases which have discussed the problem appear clearly to support a right of fair use for parody and burlesque.

1. THE ENGLISH CASES.

In *Glyn v. Western Feature Film Co., Ltd.*, 1 Ch. 261, 114 L. T. Rep. 354 (1916), the author of the somewhat notorious "Three Weeks," Eleanor Glyn, brought a copyright infringement action against the defendant who had produced a motion picture entitled "Pimple's Three Weeks (Without the Option)," which included a burlesque of some of the incidents in the book. One of the defenses was that the film "is a mere burlesque of the plaintiff's novel and that a genuine burlesque of a serious work constitutes no infringement of copyright." The case was decided upon the ground that the plaintiff's work was so immoral as not to be entitled to copyright protection, but the court referred to the above quoted defense as follows:

"Making all allowance for the fact that prior to the Act of 1911 literary copyright did not include the acting right, it is certainly remarkable that no case can be found in the books in which a burlesque even of a play has been treated as an infringement of copyright, although burlesque, frequently more distinguished than the thing burlesqued, is as old as Aristophanes, to take Mr. Hartree's example. It may well be that as far as English law is concerned one reason for this striking state of things is that the older cases insist upon the necessity of estab-

lishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original, and has often made famous a work which would otherwise have remained in obscurity. More probably, however, the reason is to be found involved in such observations as those of Lord Lindley in *Hanfstaengl v. Empire Palace* (*ubi sup.*) at p. 128, or in such a decision as that of the Court of Appeal in *Francis Day and Hunter v. Feldman and Co.* (*ubi sup.*), or in the principle that no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken, and has subjected it to such a revision and alteration as to produce an original result. . . ." (P. 356.)

The other English case on burlesque is *Carlton v. Mortimer*, MacGillivray, "Copyright Cases," 1917-23, p. 194, wherein the owners of the dramatic rights in a book entitled "Tarzan of the Apes" claimed infringement by reason of a comic acrobatic performance under the title of "Warzan and His Apes," which used two incidents from the book. The court held (in MacGillivray's words):

" . . . In the book both these features were serious, perhaps they might be described as sentimental. In the defendant's performance they were both comic to the last degree. They were intended to be comic and produce nothing but laughter. So far as these incidents might be said to be taken from the book, he was satisfied that they were a mere burlesque of these incidents. Without going to the extent to which he understood Mr. Justice Younger went into the case of *Glyn v. Western Feature Film*

Co., 1916, 1 Chancery 261, in saying that a burlesque never can be an infringement of copyright, he was of opinion that the burlesquing of these two trifling incidents and the production of the performance under a title which was somewhat similar in sound to, but different in fact from, the title of the novel did not amount to an infringement of the plaintiff's rights. . . .”

Hanfstaengl v. Empire Palace, 70 L. T. Rep. N. S. 854 (1894), referred to in the *Glyn* decision, was a case in which the defendant had printed drawings in its newspaper of living tableaux depicted on the stage of a theatre, which tableaux were in turn representations of copyrighted pictures. For the purpose of their decision the judges treated the sketches as having been made *from the pictures themselves*,* but found no infringement. Lindley, L. J., after pointing out that fair reviews of literary works may properly contain lengthy extracts from the original and referring to the consideration to be given “the object sought to be attained by the copies complained of,” states:

“. . . Guided by the foregoing considerations and by the principles acted upon in the decisions to which I have referred, I ask myself whether these sketches are such copies of the plaintiff's pictures, or such reproductions of the designs thereof, as are struck at by the statute which confers copyright in such pictures. My answer to this question is, No.

*Judge Carter dismissed this case from consideration on the ground that the decision was limited to a holding that a “copy of a copy which is not itself a copy of the original does not infringe.” 131 F. Supp. at 180. He overlooked the fact that each judge in giving his opinion expressly refused to rest the decision on this narrow ground.

The sketches are not intended to be, and are not in fact, copies of the pictures at all, neither are they intended to be, nor are they in fact, reproductions of the designs of the pictures. They do not represent any of the beauties of the pictures. They are rough sketches, *made for a very different purpose and answering a very different purpose,** that purpose being, not to give an idea of the plaintiff's pictures, but to give a rough idea of what is to be seen at the Empire Theatre. . . . *The amusing sketches in Punch of the pictures in the Royal Academy are not, in my opinion, infringements of the copyrights in those pictures, although probably made from the pictures themselves.* The application of similar principles to the different facts of this case leads me to a similar conclusion. In neither case is there any piracy, actual or intended. . . ." (Pp. 860-861.)

Davey, R. J., states in his opinion:

" . . . The pictures of which these sketches are said to be piratical copy or reproduction are works of art calculated to please the eye and the taste by a beautiful arrangement of form and colour, and to excite the emotions by the scenes depicted and thoughts suggested by the imagination or fancy of the artist. As objects of attraction *they depend not on the mere outline or configuration, but on the artistic feeling and power with which the subject is treated.* The sketches before us are mere outlines, descriptive, more or less accurate, of the grouping and pose of the figures, and to a limited extent of the subject-matter of the pictures, but destitute of everything which makes the pictures works of art,

*Throughout this brief, emphasis in quotations has been added unless otherwise noted.

and constitutes their claim to protection under the Act. . . . The point is not that these things are bad copies, but that *they are not intended and do not purport to reproduce the value and essential qualities of the pictures as works of art, and are, therefore, not copies or reproductions at all within the meaning of the Act.*" (P. 862.)

2. THE AMERICAN CASES.

The one American case which involves burlesque or parody in any way is *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (S. D. N. Y. 1914). There plaintiff was the exclusive licensee of the dramatic rights to the well known cartoon "Mutt and Jeff." Defendant produced a dramatic performance entitled "In Cartoonland" in which he introduced characters called "Nutt" and "Giff", who were costumed exactly like the cartoon characters and whose actions and speech were in harmony with the spirit of the cartoons. It was as palpable a steal as could be imagined. See *King Features Syndicate v. Fleischer*, 299 Fed. 533, 536 (2d Cir., 1924). Defendant in the *Hill* case had the temerity to claim his use was a "burlesque," perhaps referring to the type of theatre in which it was performed. The court properly denied his claim. The cartoon strip itself was a burlesque of human nature, and one certainly cannot burlesque a burlesque. In its decision, however, the court stated:

"A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. . . .

"One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much

as has been reproduced as will materially reduce the demand for the original . . . The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.

“In this case, I am satisfied that the representation of defendant’s ‘In Cartoonland’ was calculated to injuriously affect, and that to a substantial degree it did so affect, the value of complainant’s copyright. Those who saw ‘Nutt’ and ‘Giff’ would have less keen a desire to see ‘Mutt’ and ‘Jeff’. . . . A good many of them would probably think that they had already seen those characters. They would not be far wrong in so thinking. . . .” (P. 360.)

This case thus stands squarely for the principle of fair use, and the limitation on that principle, for which we contend.

The trial judge discussed three early American cases involving mimicry by a performing actor. In *Bloom & Hamlin v. Nixon*, 125 Fed. 977 (E. D. Pa., 1903), the singing verbatim of the complete chorus of a popular song as a part of an imitation of another singer was held a fair use. The same decision was given in *Green v. Minzensheimer*, 177 Fed. 286 (S. D. N. Y., 1909), where one verse and a chorus was sung. On the other hand, in *Green v. Luby*, 177 Fed. 287 (S. D. N. Y., 1909), the whole song was used in connection with the imitation of another singer, and it was held not a fair use.

These cases do not involve literary burlesque at all. In each of them the plaintiff was the owner of a copyrighted song and all or a part of his work was produced verbatim in the same form and manner as it might be presented by any commercial licensee of the right to perform a song. There was no attempt to transmute or change it in any way. Literary creation—authorship—by the accused was not involved.*

3. TEXTBOOKS AND TREATISES.

Uniform support for the position that bona fide parodies and burlesques are “fair uses” is found in American textbooks and treatises, some of which are quoted below:

“A bona fide burlesque is not an infringing copy.
. . . A genuine burlesque of a serious work is not
an infringement.”

13 C. J. 1113, 1118.

“A recognized form of review, although its nature is not always fully appreciated by its victims, is parody. It is entirely within the limits of fair use to make parodies or literary perversions of copy-

*Similarly, *Leon v. Pacific Tele. & Tele. Co.*, 91 F. 2d 484 (9th Cir., 1937), which Judge Carter cited, has very little, if anything, to do with the question of burlesque or parody of another's literary work. In the *Leon* case the plaintiff had compiled a telephone directory. Working from that directory alone, defendant physically rearranged it to place the information in a different order. He made no attempt to gather his own information or to do any original work whatever, although the field was open to him. See *Hartford Printing Co. v. Hartford Directory & Pub. Co.*, 146 Fed. 332 (C. C. Conn., 1906). He neither added to nor changed the plaintiff's material in any way. There was nothing involved on the defendant's part except the act of copying plaintiff's listings verbatim.

righted works, even, it seems, in the form of drawings or cartoons.”

Weil, “Copyright Law,” p. 432.*

“It is well settled that a parody is not an infringement of the right to copy A peculiar application of the doctrine [of fair use] is also found in the law relating to parodies which often approach actual copying but have always been held legitimate.”

De Wolf, “Outline of Copyright Law,” pp. 97, 142.

See also Spring, “Risks and Rights”, pp. 177, 183, 186; Cohen, “Fair Use in the Law of Copyright,” *op. cit.* p. 54, *et seq.*; Lindey, “Plagiarism and Originality”, p. 43.

Judge Leon Yankwich has written an article on the subject of “Parody and Burlesque in the Law of Copyright” in the December, 1955, issue of the Canadian Bar Review. After a careful review of the history of the art and of all the cases, he expresses strong disagreement with the position of the trial court upon this issue. Judge Yankwich says:

“The law of copyright must be equated with the primary purpose of promoting the progress of science and arts. ‘Fair use’ was evolved as a concept by the courts in the English-speaking world with a view to aiding the development of science and arts by allowing use of copyrighted materials despite the monopoly of copyright. Its application to parody

*The trial judge’s statement that “Weil, Ball and Amdur are specifically contrary to defendant’s position” (pp. 180-181) overlooks the fact that the comments of these writers to which he refers as being “contrary” all deal with the mimicry cases. As we have pointed out, these cases do not at all involve the same elements of use as exist in the case of burlesques or parodies of literary works.

and burlesque must take into consideration the elements the courts have applied to it, namely: (1) the quantity and importance of the portions taken; (2) their relation to the work of which they are a part; and (3) the result of their use upon the demand for copyrighted material.

"If, however, we confine its application to the first element only—the quantitative and qualitative element, applicable when material is used directly, in serious reproduction—we in effect reject, or restrict unduly, its application to parody or burlesque. In the light of literary history and the purposes of the copyright laws, we should extend rather than constrict the boundaries of 'fair use.' The controlling question should be, not whether the parody or burlesque contains the skeleton or outline of the play or story it criticizes or ridicules, but whether it is true parody or a mere subterfuge for appropriating another person's intellectual creation. 'Fair use' thus becomes determinable in the light of all the valid judicially established criteria, including the result to be achieved,, and in consonance with literary reality. . . ." (P. 1152.)

D. The Burlesque, "Autolight," Is a Fair Use of "Gaslight."

"Autolight" was an undisguised burlesque of "Gaslight." To burlesque, it necessarily had to use recognizable elements of "Gaslight" to remind the audience of that picture. Otherwise the burlesque had no point. But it took only what was reasonably necessary to produce the new artistic creation—the burlesque. It was, in short, a fair use of the copyrighted material in "Gaslight."

The great force and impetus of the picture "Gaslight" is created through the building up, brick by brick, of an entire structure. Each scene adds its small but effective strength and weight to the development of the picture's

tone. The imaginative treatment of incidents, scene by scene, creates the motivation and characterization and the heightened atmosphere of suspense which culminates finally in the sweeping climax. It was not the bare bones of the story that gave "Gaslight" its values; it was the expression, treatment and development of those bare bones—the deft way in which the author projected into reality an idea. The plot structure of "Gaslight" was of course necessary, but the skill or genius of the author did not lie in its concoction, nor did the value of the play to the beholder arise from it.

The writers of "Autolight" used absolutely none of the expression, treatment or development that made "Gaslight" a good, or even a great, motion picture. They used its bare bones—the greatly abbreviated story line and a very few of its incidents. They mocked in an exaggerated and ludicrous fashion the leading characters in the same fashion as has been done immemorially. What they did with these bare bones was to adorn them with their *own* treatment, expression and development, thereby creating something new. They could not have created a burlesque of "Gaslight" without using at least these bare bones or their equivalents.*

Everything that was serious, tense and dramatic in the original becomes hilarious in the burlesque. The whole tone of the original which the title, the setting, the cast, and the naked events have recalled to mind, is instantly transformed into the comic. Each happening that had its tremendously dramatic impact on the viewers of "Gaslight" is subjected to a contrast with absurdity. Each full-statured character is contrasted with its carica-

*Dr. Baxter contrasted the literary values of the two works [R. 153-155].

ture. The wife is terrified—of Jack Benny! Her forgetfulness consists of hiding a horse in a closet! The detective doubles as a carpenter—he knows about the house because he built it! And so on.

In the entire motion picture there is not even a single chuckle and almost never a smile; in the burlesque there is scarcely an instant's interruption of the audience's laughter. That result is produced, and could only be produced, by reason of the talents and ability for the construction of comedy possessed by the writers of "Auto-light"—talents and abilities which in their very different way are perhaps equal to those of the writers of "Gaslight", and which are exercised just as much, if not more, in creating this burlesque as they would be in creating any other comic work.

The contemporaneous reviews of the motion picture "Gaslight" appearing in periodicals gave to the public much more information concerning the picture—much more of the story line—than could ever be obtained from watching the 15-minute performance of "Autolight."* Yet, as the cases cited above (pp. 24-25) make clear, no infringement of copyright could be claimed by Loew's against any of the newspapers or magazines which reviewed the original motion picture. The use which "Auto-light" made of the bare bones of "Gaslight" was as much a fair use of appellant's copyrighted material as was the more extended use of the same bare bones in the allied but no more firmly established field of critical review.

*See "Life," May 22, 1944; "Time," May 22, 1944. "Life" contained four full pages of pictures and comments outlining the story in detail and comparing the motion picture with the stage play.

Not only did the writers of "Autolight" use less than the very reviewers who reviewed the picture, but far less than did the authors of most of the burlesques and parodies we have discussed. (See pp. 14-21, *supra*.) And just as was the case in those works, every element which Benny's writers used was changed, inverted and metamorphosed into a diametrically opposite set of literary values from those created by the authors of "Gaslight." It was what the authors of "Autolight" *did* with the bare bones of "Gaslight" that produced this new and original and extremely funny television program.

"Autolight" is no plagiarism. Nobody could possibly think on seeing "Autolight" that he was seeing a performance of "Gaslight," or that he was seeing a copied version of "Gaslight." Upon seeing "Autolight," the viewer would no more be deterred from seeing "Gaslight" than he would have been by the fact that he read the story in the reviews in the current newspapers and periodicals. The two works are so diametrically opposite that neither could in any way supersede or be a substitute for the other. They are directed towards two entirely different facets of human emotion and interest.

"Autolight" was a new and independent literary work. It was not a "servile imitation" as Lord Mansfield put it.* It had its own values and its own place in the field of entertainment. It was a creative work in an established field of useful art. The use of copyrightable material necessary to its production as a work in that field was a fair use in accordance with the Constitution's command that the copyright law shall "promote . . . useful Arts."

**Sayre v. Moore* (Eng. 1785), 1 Easts Reports 359.

III.

The History of the Copyright Act and Long-established Custom Constitute a Statutory Construction That the Burlesquer and Parodist Have the Right of Fair Use.

The first Federal Copyright Act was passed in 1790 and covered only maps, charts and books. By the revision of 1831, musical compositions were added and the term of years extended. In 1856 the author of a dramatic work was given the performance rights as well as the publication monopoly. In the complete revision of the Act in 1870, other works such as statuary and models were added to the protectible items and the author was permitted to reserve rights of dramatization and translation. The last complete revision of the Act took place in 1909, but, other than granting a dramatist the right of novelization, it made no substantial change in the rights protected with respect to books or plays.

No rights exist in appellees except as created by the statute. Consequently, if they are to prevail, they must establish that Congress intended from 1790 on to grant the right to copyright owners to prohibit burlesques of particular books, and from 1856 on to prohibit the performance of dramatic burlesques. During the entire period since long before 1790 to the present date, literary and dramatic burlesques of particular works, using story line, characters and situations as a springboard for new, imaginative and creative efforts, were not only common, but increasingly so. Such burlesques were the publicly accepted custom. Under these circumstances, if Congress had intended that authors should be protected from having their works burlesqued or parodied, "it would seem," as this Court said in a closely analogous circumstance, that

“Congress would have made specific provision therefor.” *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F. 2d 945, 950 (9th Cir., 1954); see *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1 (1908). Yet Congress has taken no action indicating any intent to limit the rights of the parodist or burlesquer. The acquiescence of Congress in the publicly accepted custom of burlesque is a legislative recognition that the Act never was intended to and did not prohibit such custom.

Not only Congress, but all of those concerned have acquiesced in the understanding that the burlesquer and parodist have a right of fair use. As we have shown, literary history abounds with examples of the burlesque of the particular, using “substantial” portions of protectible property measured by the ordinary infringement tests. Yet in all recorded history no author or copyright proprietor (with the sole exception of Eleanor Glyn and perhaps the licensee of “Tarzan and the Apes”) has ever before made legal claim that a bona fide burlesque or parody of any book or play was an infringement of its copyright.

Almost from their inception, radio and television have burlesqued books, plays, and especially motion pictures. The evidence shows that since 1932 Jack Benny alone has presented burlesques of sixty-three current motion pictures, including those produced by all of the leading production companies. [R. 57-61.] If the motion picture companies had been of the opinion that a burlesque of their expensive pictures constituted an infringement of their valuable statutory rights therein, they would have long since made that position clearly known. Yet as far as this record shows, no other motion picture company,

author or other person even made a protest against such use on legal grounds during all these years until appellees made their first complaint on January 30, 1952.

Where all of the people so immediately concerned—authors and publishers of literary and dramatic works and producers of motion pictures, including appellee Loew's—have acquiesced for a long period of years in the understanding that the use was not an infringement, it constitutes an interpretation of the Act which is entitled to substantial weight under established rules of statutory construction. *United States v. State Bank of North Carolina*, 6 Pet. 29 (1832); *United States v. Farrar*, 38 F. 2d 515, 517 (D. C. Mass., 1930); *Wells Fargo & Co. v. Mayor and Alderman of Jersey City*, 207 Fed. 871 (D. C. N. J., 1913); 50 Am. Jur., Statutes, Secs. 319-320, p. 309.

The trial judge refused to accept this argument on the ground that appellants did not prove that the literary burlesques and parodies in the long history of the art were done over the objection of the authors burlesqued. This ground misinterprets the contention. We are not relying upon any established *custom to infringe* as supporting a continuation of a right to infringe; we are asserting that the failure of anyone to claim that a burlesque or parody *was* an infringement is evidence of the generally accepted belief that the copyright law did not extend to protection against this type of use.

Moreover, we do know that many authors objected to having their works burlesqued [R. 160], although it is of course not now possible to prove that *every* author was displeased. Richardson never forgave Fielding for "Shamela." (Shepperson, p. 28.) "We find Wordsworth, Arnold, and Browning resenting the parodying of their works. Browning fiercely declined to have certain

poems of his appearing side by side with parodies of them." (Kitchin, p. xviii.) And we suggest that the Court may take judicial notice of the natural human resentment at having a work of art created through loving labor set up as a target for laughter.

Another fact demonstrates both the general acquiescence in the proposition that burlesque and parody do not constitute copyright infringement and the validity of the assumption that consent to burlesque was neither ordinarily sought nor secured. It is well settled that if an author voluntarily permits the publication of his material or any substantial part thereof and fails to accompany such publication with the required notice of copyright, he loses forever his copyright in that material. *Deward & Rich Inc. v. Bristol Savings & Loan Corporation*, 120 F. 2d 537 (4th Cir., 1941); *Atlantic Monthly Co. v. Post Pub. Co.*, 27 F. 2d 556, 559 (D. Mass., 1928). Yet to our knowledge no published burlesque or parody contains copyright data concerning the work parodied, although of course many, if not most, burlesques and parodies are of copyrighted works. It must follow that the author of the original did not give his permission to use his work, or if perchance he did, he did not consider such use was an infringement of his copyright; otherwise, he would have insisted on its protection by proper copyright notice.

American courts have been uniformly hesitant to extend copyright protection by interpretation, preferring instead to leave such matters to Congress. *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1 (1908); see *Fitch v. Young*, 230 Fed. 743, 745 (1916). In accordance with that wise policy, if the parodist's or burlesquer's right of fair use is to be limited in some way after all

these years, the matter is one for the careful consideration of Congress in whose hands the Constitution placed power to grant copyright monopolies.

Conclusion.

If the useful art of burlesque and parody is to flourish in the future as it has in the past, burlesquers and parodists must have a right to make a fair use of copyrighted material. This right of fair use is supported by the constitutional provision authorizing copyrights, by cases which have adverted to the problem, by text books and treatises, and by decisions in analogous cases. The burlesque "Autolight" was a new, independent, and wholly different work from the motion picture "Gaslight," and could not have been created without the use of protectible material from that motion picture. Its use of such material is a fair use and not a copyright infringement.

For the foregoing reasons, appellants submit that the decision of the Trial Court should be reversed.

Respectfully submitted,

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APPENDIX.

Synopsis of Gaslight.

The motion picture "Gaslight" is a tense and gripping psychological drama. Its theme is that of the attempted destruction of one human being by another solely through pressure on the mind. It has but three protagonists—the husband, the wife and the detective. The husband, portrayed by Charles Boyer, combines obsession and sadism, on the one hand, with a never-to-be-lost charm and fascination on the other. The wife, portrayed by Ingrid Bergman, presents the tragic spectacle of a loving, gentle, animated spirit, slowly but certainly being driven to the brink of madness, not by physical cruelty, but by subtle, psychological pressure of a subtle and horrible character. The detective is the *deus ex machina*—the active means by which the dilemma is resolved.

The atmosphere is set in the opening scene where the young girl, Paula Alquist, accompanied by the kindly family solicitor, drives off through the fog-shrouded streets of London from the home where her aunt has been brutally murdered by an unknown killer. The scene immediately shifts to a bright and sunny Italian locale. This is the background for an idyllic love affair between Paula and the utterly charming and romantic music student, Gregory Anton, culminating in their marriage and honeymoon in the Lake Como region of the Alps. The audience is made to hope that the tragedy in Paula's life is over and that nothing but happiness lies ahead. The return to London and to the oppressive atmosphere of the old house creates foreboding, but there is still no real hint of the mental drama about to be unfolded between husband and wife.

Paula discovers a letter written to her aunt by a "Sergius Bauer," and Gregory demonstrates a flash of sinister concern over that discovery although it is deftly passed off by the husband as solicitude for his wife. From that moment the subtle attack on Paula's mind begins to unfold. The fact that Gregory is not the gentle, romantic person that Paula believes is developed by sequences involving a vicious little housemaid, other servants, and an intrusive spinster.

The pressure on Paula's mind soon takes form. A family heirloom given to her by Gregory is unaccountably "lost," and it is impressed upon her by her husband that this is but one of a number of similar "losses." He suggests to her that she may be losing her mind and she is forced into an acute fear of leaving the house. At the same time we see still another side of Gregory in his obvious lust for jewels. In the meanwhile, the detective has commenced his investigation of the occupants of the house and new pieces of the puzzle fall into place. We learn that Paula's aunt was murdered for her priceless jewels which have never been found. The detective places the house under surveillance.

The mental pressure upon Paula becomes relentlessly greater. She is made to feel almost an interloper in her own home and before the servants. In an apparent sudden change of character Gregory offers to take her to the theatre to her almost hysterical joy. This is but another turn of the screw, however. Dramatically he crushes her through the device of accusing her of removing a picture from the wall, and by confrontation of her in the presence of the servants, heaps humiliation and shame upon her.

Furthermore, strange things happen in the house itself. Each night after Gregory leaves, ostensibly to work on

his music, the gaslight dims and the house is filled with fear-inspiring noises from the attic.

The climax to this mental torture comes when Paula, trying to escape from herself, forces her husband to attend a reception with her only to have him there "prove" by the device of a missing watch that she is mad. Hysterically she rushes home where Gregory deals the final blow, telling her that her mother had died of insanity (a palpable falsehood). He informs her that he is prepared to have her committed to an asylum for the insane.

But he has not yet won. The detective has by now put his case together. When Gregory is away on one of his nightly excursions, he forces his way into the home, and in a scene of great drama explains to her the terrible plot of which she has been the victim. At the very moment Gregory is in the attic above the house searching again for the missing jewels of the woman he murdered. He had hoped by driving his wife mad to inherit the house so that the search might be facilitated. The detective leaves to arrest Gregory, who, however, returns to the house by a different route. Discovering that his papers have been tampered with, he realizes he must act quickly. He confronts Paula whose mind has been so crushed that he easily induces her to believe that the detective himself was a dream.

The denouement comes immediately when the detective returns, seizes Anton after a short struggle and ties him to a chair. Paula asks to speak to her husband alone. Exercising all of his undeniable charm, he mentally forces her to secure a knife, apparently to cut him free. Instead, struggling as she is against what has happened to her, she throws the knife away, hysterically crying, "Whatever you have done, I could have pitied and protected you."

But, because I am mad, I hate you, because I am mad, I have betrayed you, and because I am mad, I'm rejoicing in my heart without a shred of pity, without a shred of regret—watching you go with glory in my heart. Mr. Cameron! Come! Come, Mr. Cameron! Take this man away. Take this man away!

This is a picture of suspense and sustained horror, but not the horror of the Frankenstein monster or the ape men. The horror is created by a diabolical form of mental torture. Never is the audience permitted a letdown. The few small touches of humor—the inquisitive nosiness of the neighbor, the pert flippancies of the housemaid, a touch here and there of Cockney dialect—serve only to intensify the effect of the dramatic matters which precede and follow.

Synopsis of Autolight.

The television play or skit, running for 15 minutes as compared with the 1 hour and 40 minute long motion picture, uses only two of its basic incidents: (1) The episode with respect to the picture on the wall, and (2) the denouement of the disclosure by the detective, the capture of the husband and his final failure to induce his wife to free him. The rest of the elaborate development of the motion picture plot is compressed into a single line of spoken introduction, "Outwardly the atmosphere is one of peace, for even the servants are unaware that for the past weeks the master of the house has been systematically pursuing a sinister, diabolical scheme to drive his wife insane."

When the curtain rises, we see the same type of stuffy, ornate living room that appeared in "Gaslight." The servants on stage are decorously dressed; yet a note of in-

congruousness is immediately injected by the size of the feather duster. The dramatic entrance of the wife, Bella (purposely overacted by Miss Stanwyck), certainly stirs memories of Miss Bergman, but it is brought sharply into its proper place in the scheme of this skit when we are told of the contents of the luncheon ordered for her by her husband—marinated salami with sour cream, to be eaten through the use of chopsticks. Benny's dramatic entrance as Charles, the husband, garbed *a la* Boyer, is an intentional slice of ham. The very way in which he removes his gloves, finger by finger, contributes to the hilarity.

From this point on the gags come thick and fast. The dramatic scene of the lost picture gets its belt with the fool's bladder when Jack slyly turns a portrait of a woman upside down and her hair, hanging downward, falls out of the picture. The butler is called in; it proves to be Rochester, who speaks comic English with a Harlem accent and indulges in topical gags. Benny's imitation of Boyer tugging sternly on the bell rope is followed by a shower of plaster which he accepts with the customary Benny injured and stoic innocence. The entire scene is filled with verbal and physical gags delivered in overacted seriousness. Bella's hysterical scream that confinement in her room is driving her mad is followed by an example of that confinement—"Breakfast in bed, lunch in bed . . . I couldn't have dinner in bed, it was full of dirty dishes." Benny emphasizes his wife's forgetfulness by pointing out that "Yesterday when we came back from the fox hunt, you hung your riding habit in the stable and put the horse in the closet."

After Jack's melodramatic exit, and with the entrance of the detective the fun becomes fast and furious and the

gags run wild. He is mistaken for the husband, with the expected result of an affectionate greeting by Miss Stanwyck, which is a most pleasant surprise to him. When he tries to hide in the closet to avoid discovery by the husband's return, there *is* the horse, big as life. To sustain him during his period of hiding, he also gets the marinated salami. Returning, Jack announces his intention of sending his wife away because of her habit of "turning everything upside down." As an appropriate gag, the butler (Rochester) arrives walking on his hands and carrying a tray on his feet.

The climax comes quickly. Bella accuses her husband of being a murderer; he purports to strangle her, but she is saved by the detective who emerges from the closet where he has been confined with the marinated salami, asking, "Pardon me, but do you have any rye bread?" Jack is duly tied and the couple is left alone. Jack pleads with her to get the knife and cut him loose, to which she, with a fiendish look in her eyes, says, "Yes, Charles, I am going to cut you *very* loose," and coming towards him with a knife gives her curtain speech (a travesty of Paula's hysterical outburst at the close of the motion picture):

"Crazy? . . . Maybe I am . . . But it was you who drove me to it . . . It was you who turned the pictures upside down. . . . It was you who turned the lamp upside down and almost convinced me that I did it. . . . Then you turned the table upside down . . . the desk upside down

. . . One day I baked an upside down cake and you turned it rightside up. . . .

JACK

“Bella!

“(AS BARBARA GOES FOR HIS NECK WITH KNIFE, THE GIRL ACROBAT COMES ON AND KEEPS DOING HAND SPRINGS ON STAGE TILL FINISH.)

JACK

“Bella, don’t kill me . . . don’t kill me!

BARBARA

“No, I won’t kill you. That’s too good for you. I’m going to let them take you away . . . INSPECTOR . . . INSPECTOR . . .

“(SHE GOES TO THE BELL ROPE AND PULLS IT . . . BOB [detective] COMES IN AS PLASTER AND BRICKS FALL FROM CEILING ALL OVER EVERYTHING.)”

No. 14928

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vs.

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Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN
TOBACCO COMPANY,

Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

BRIEF OF APPELLEES.

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TOPICAL INDEX

	PAGE
Preliminary statement	1
Jurisdiction	4
Statement of the case.....	5
Summary of the argument.....	6
Argument	8

I.

The finding of substantial copying is supported by substantial evidence and compels the conclusion of copyright infringement. That is true regardless of the form or mode in which the pirated material is used by the infringer.....	8
---	---

II.

The doctrine of fair use is not applicable.....	15
A. Appropriation of substantial copyright material cannot be justified because the material is used as parody or burlesque	15
B. Fair use is based on implied consent and the absence of any tendency to supplant or compete with the appropriated work. It cannot be found here because the requisite consent cannot fairly be implied in view of the invasion of appellees' right of exclusion and the direct competition between television and motion pictures	18
C. The authorities upon which appellants rely do not support their position.....	23

III.

Custom, even if established which it was not, cannot change or limit the plain meaning of the Copyright Act.....	39
--	----

Conclusion	43
------------------	----

Appendices :

Appendix "A." Defendants' television play (2d ed.) with material taken from plaintiff's photoplay deleted.....App. p.	1
Appendix "B." Defendants' television play (2d ed.) with materials supplied by them deleted.....App. p.	9,

ii.

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Institute of Architects v. Fenichel, 41 F. Supp. 146....	19
Arnstein v. Porter, 154 F. 2d 464.....	30
Baker v. Selden, 101 U. S. 99.....	19
Bloom & Hamlin v. Nixon, 125 Fed. 977.....	16, 17, 28, 33, 37
Broadway Music Corp. v. F-R Pub. Corp., 31 F. Supp. 817.....	19
Carlton v. Mortimer, McGillivray's Copyright Cases (1917-23), 194	26, 30
Coleman v. Walthen, 5 T.R. (Eng.) 245.....	2
Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348	42
Conde Nast Publications v. Vogue School, 105 F. Supp. 325....	19
De Acosta v. Brown, 146 F. 2d 408.....	10
Falk v. Donaldson, 57 Fed. 36.....	13, 22
Ferris v. Froham, 223 U. S. 424.....	40
Fleischer Studios v. Ralph A. Freundlich, Inc., 73 F. 2d 276, cert. den. 294 U. S. 717.....	3, 13
Folsom v. Marsh, 9 Fed. Cas. 342, Case No. 4901.....	10, 12, 19, 37
Fox Film Corp. v. Doyal, 286 U. S. 123.....	14, 35
Glyn v. Weston Feature Film Co. (Eng., 1916) 1 Ch. 261.....	23, 24, 25, 29, 31, 32
Green v. Luby, 177 Fed. 287.....	15, 17, 28, 33
Green v. Minzenheimer, 177 Fed. 286.....	15, 17, 33
H. Blachloch & Co. v. Arthur Pearson, Ltd. (Eng. 1915), 2 Ch. 276	29
Hanfstaengl v. Empire Palace (Eng., 1894), 3 Ch. 109....	29, 30, 31
Harms v. Cohen, 279 Fed. 276.....	11, 22
Henry Holt & Co. v. Liggett & Myers Tob. Co., 23 F. Supp. 302	11, 18, 20
Hill v. Whalen & Martell, 220 Fed. 359.....	14, 17, 19, 28, 33, 36, 37
Johns & Johns P. Co. v. Paull etc. Corp., 102 F. 2d 282.....	11, 22
Karll v. Curtis Pub. Co., 39 F. Supp. 836.....	19, 21
King Features Syndicate v. Fleischer, 299 Fed. 533.....	3, 13, 40

iii.

PAGE

Lawrence v. Dana, 15 Fed. Cas. 60.....	19
Leon v. Pacific Tel. & Tel. Co., 91 F. 2d 484.....	
.....2, 14, 19, 20, 21, 23, 28, 29, 32, 35	
Lincoln Nat. L. Ins. Co. v. Mathisen, 150 F. 2d 292.....	8
M. Whitmark & Sons v. Pastime Amuse. Co., 298 Fed. 470.....	11, 17
Macmillan Co. v. King, 223 Fed. 862.....	19, 22
Marx v. United States, 96 F. 2d 204.....	20
Mathews Conveyor Co. v. Palmer-Bee Co., 135 F. 2d 85.....	18
Mazer v. Stein, 347 U. S. 201.....	14
National Comics v. Fawcett Publications, 191 F. 2d 594.....	14
New York Tribune v. Otis & Co., 39 F. Supp. 67.....	19
Nichols v. Universal Pictures Co., 45 F. 2d 119, cert. den. 282 U. S. 902.....	3
Nutt v. National Institute, 31 F. 2d 236.....	13
Reed v. Holliday, 19 Fed. 325.....	11, 19, 22
Sampson & Murdock Co. v. Seaver-Radford Co., 140 Fed. 539	18, 21
Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49.....	1, 18
Simmons v. Stanton, 75 Fed. 10.....	19
Stein v. Mazer, 204 F. 2d 472.....	14
Stein v. Rosenthal, 103 Fed. Supp. 227, aff'd 205 F. 2d 633....	3, 14
Story v. Holcombe, 23 Fed. Cas. 171, Case No. 13497.....	2, 10, 33
Stowe v. Thomas, 23 Fed. Cas. 201, Case No. 13514.....	2
Toksvig v. Bruce Pub. Co., 181 F. 2d 664.....	11, 19, 22
Towle v. Ross, 32 F. Supp. 125.....	11, 18
United States v. Dodson, 268 Fed. 397.....	39
United States v. Pine River Logging etc. Co., 89 Fed. 907.....	39
Universal Pictures Co. v. Harold Lloyd Corp., 162 F. 2d 354....	1, 8, 10, 11, 13
W. H. Anderson Co. v. Baldwin, 27 F. 2d 82.....	21
Warner Bros. v. Columbia Broadcasting System, 102 F. Supp. 141	18

iv.

	PAGE
Warner Bros. Pictures v. Columbia Broadcasting System, 216 F. 2d 945.....	10
Warner Bros. Pictures, Inc. v. Majestic Pictures Corp., 70 F. 2d 310	30
Warren v. White etc. Mfg. Co., 39 F. 2d 922.....	11, 22
Webb v. Powers, 29 Fed. Cas. 511, Case No. 17323.....	19, 37
West Pub. Co. v. Edw. Thompson Co., 169 Fed. 833, modified 179 Fed. 833.....	20
Wetherby & Sons v. International House Agency (Eng. 1910), 2 Ch. 297.....	29

RULES

Federal Rules of Civil Procedure, Rule 52(a).....	8
---	---

STATUTES

English Copyright Act of 1911 (1 & 2 George V, Chap. 46, Sec. 2(1)	27
Statute of 8 Anne, Chap. 19,.....	40
1 United States Statutes, p. 124.....	40
United States Code, Title 17, Sec. 1.....	2
United States Code, Title 17, Sec. 1(a)(c).....	41
United States Code, Title 28, Sec. 1291.....	4
United States Code, Title 28, Sec. 1338(a).....	4

TEXTBOOKS

33 Canadian Bar Review, p. 1130.....	34
Clarke, Copyright and Industrial Design, p. 63.....	26, 27
Copinger & Skone James, Law of Copyright (8th Ed., 1948), pp. 129, 131-132.....	26
6 Copyright Law Symposium, p. 54, Cohen, Fair Use in the Law of Copyright.....	36
13 Corpus Juris, pp. 1113, 1118.....	32
7 Halsbury's Laws of England (2d Ed. 1932, edited by Lord Hailsham), Sec. 893, p. 567.....	25, 30
McGillivray's Copyright Cases (1917-23), p. 194.....	30
Weil, Copyright Law, p. 432.....	32



E R R A T A

- p. 29 - At end of first full paragraph, add:
This Court disagreed.
- p. 35 - Note 17, third line: "[R.....]"
should be "[R. 64, 67-69]"
- p. 36 Note 19, second line, third word:
"Not" should be "Note"

No. 14928

IN THE

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vs.

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BRIEF OF APPELLEES.

Preliminary Statement.

The judgment in this cause rests upon a finding of fact that the appellants' television play "Auto Light" was copied by them "in substantial part from the motion picture photoplay 'Gas Light' . . ." and that the "part so copied was and is a substantial part of said [television] play and of the copyrightable and copyrighted material in said motion picture photoplay." [Finding XII, R. 84.] Such a finding should inevitably compel the conclusion of copyright infringement. [*Universal Pictures Co. v. Harold Lloyd Corp.*, 9 Cir., 162 F. 2d 354, 360-361; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 2 Cir., 81 F. 2d 49, 55-56.] That was, of course, the conclusion reached below.

Appellants seek to avoid that conclusion by an elaborate argument to the effect that parody or burlesque is a separate art form, socially valuable and of ancient lineage. So are many other forms of literary or artistic expression—*e.g.*, the drama or the novel. Yet, admittedly and necessarily, the serious dramatist or novelist who, in substantial part, copied his play or novel from the copyrightable and copyrighted material in appellees' photoplay would be an infringer, not a fair user. Why should the parodist, and only the parodist, stand in any better or different position before the law? Certainly this Court has not recognized the notion that "wholesale copying and publication of copyrighted material can ever be fair use" [*Leon v. Pacific Tel. & Tel. Co.*, 9 Cir., 91 F. 2d 484, 486.]

The Copyright Act does not distinguish between classes of infringers. Nor does it limit the exclusivity of the copyright by the form in which the pirated material is reproduced. To the contrary, the history of copyright is one of gradual extension of the rights of the copyright owner. He was not always protected by statute against appropriation of his material for many profitable uses to which it could be put. As that fact came to be appreciated the statutory protection has been appropriately enlarged.¹

¹Until appropriate statutory additions took care of the situation a novelist, for instance, could not prevent, nor had he any redress for, an unauthorized dramatization of his work. So, too, a dramatist had no ground of complaint in law for the transformation of his play into a novel. An author could not preclude others from publishing abridgments or foreign language translations. [*Coleman v. Walthen*, 5 T.R. (Eng.) 245; *Story v. Holcombe*, C.C. Oh., 23 Fed. Cas. 171 (Case No. 13497); *Stowe v. Thomas*, C.C. Pa., 23 Fed. Cas. 201 (Case No. 13514).] All of these rights are now exclusively those of the copyright owner. [17 U. S. Code, sec. 1.]

The result of that process has been, in this country, a copyright act giving the copyright proprietor the exclusive right "to any lawful use of his property, whereby he may get a profit out of it" [*King Features Syndicate v. Fleischer*, 2 Cir., 299 Fed. 533, 535-536; *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 2 Cir., 73 F. 2d 276, 278, *cert. den.* 294 U. S. 717; *Stein v. Rosenthal*, S. D. Cal., 103 F. S. 227, 231, *aff'd*, 9 Cir., 205 F. 2d 633.]

Adherence to this doctrine will not stop or even slightly impair the proper practice of the parodist's art. It will merely deny to him a preferred position over all other kinds of authors. It will require him, along with the others, to exist on his own creative abilities instead of on the appropriation of the copyrightable works of others. The public demesne—which includes some part of every copyrighted work, see, *Nichols v. Universal Pictures Co.*, 2 Cir., 45 F. 2d 119, 121, 122, *cert. den.* 282 U. S. 902—has been heretofore thought sufficient, in conjunction with the limited term of copyright, to assure the progress of science and the useful arts. Why should the parodist, and only the parodist, have a larger and greener field in which to roam at will?

Parody, properly so-called, is just as often, if not more frequently, a lampoon of schools of thought or of social, political or economic attitudes and philosophies, or of the general and characteristic conceptions and style of some author or school of authors, as it is of the specific material or a particular work of a given author. So long as the parodist of copyrighted works sticks to that which all are free to use—ideas, general plots, abstract conceptions and the like—he has ample material for his purpose. It is only when he takes that which is, for the time being,

the exclusive property of another that the decision below operates to restrict his asserted freedom of appropriation.

We have never denied and do not now deny, that anyone—parodist as well as serious writer—may take from “Gas Light” its abstract ideas and outline, its theme and the like, and construct thereon his own treatment of the subject. We do deny that anyone—parodist or serious writer—may take from that work for his own profit the *appellee’s* treatment of the subject by taking its details, incidents and sequence of events.

Of course, parody and burlesque may be socially valuable forms of literary and dramatic expression. But they are certainly of no greater value than serious literature or drama. If the creators of the latter are limited in what they may lift from prior works, why should the parodist not be? What reason of policy or social utility is there for putting only the parodist in so greatly preferred a position over other authors generally? A decision in *appellee’s* favor in this case will not put a stop to proper parody or burlesque. But it will have the salutary effect of notifying practitioners of that art that, to the same extent as other authors, but only to that extent, they must live by their own work rather than by the theft of someone else’s.

Jurisdiction.

1. This being a case for infringement of a copyright it arises under the Copyright Laws of the United States. [R. 3.] The District Court’s jurisdiction was properly invoked under 28 U. S. Code, sec. 1338(a).

2. Jurisdiction of the Court of Appeals arises under 28 U. S. Code, sec. 1291, the District Court having rendered a final decision in a case within its original jurisdiction. [R. 88.]

Statement of the Case.

Appellants' statement needs some supplementation to bring out the entire context of fact in which this case was decided.

Prior to December 5, 1938 appellee Patrick Hamilton created and wrote an original dramatic composition entitled "Gas Light." The play was first publicly performed in England where it was protected by the British Copyright Act of 1911. It was duly registered for copyright in the United States as a foreign work on November 18, 1941. [R. 49-52.] The world motion picture rights in the play were sold to appellee Loew's Inc. in 1942 for \$150,000.00. [R. 52-53.]

Loew's produced and copyrighted a motion picture photoplay based on the Hamilton play. A total of \$126,691.28 was expended in connection with the writing of the screen play for the motion picture. The total production cost was \$2,458,275.18.² [R. 53-55.] The photoplay was quite successful, playing to audiences of about 24,000,000 in this country and another 27,786,000 in foreign lands. It is still in release and distribution in foreign countries, but not in America. [R. 55-56.] It is a customary and usual practice to reissue a motion picture five years or more after its initial release. "Gas Light" has not yet been reissued. [R. 56.]

²These cost figures give some idea of the vast and expensive effort which goes into the production of a motion picture of the caliber of "Gas Light." They also indicate how much of a bonanza it would be to television—which, after all, is a strong and vigorous competitor of motion pictures in vying for the time and patronage of entertainment audiences—to be able to appropriate without cost or effort the expensive dramatic material acquired, created and adapted by motion picture producers for their own product,

Appellants and their writers had ample access to appellees' photoplay. They had a copy of the screenplay, obtained without Loew's notice or consent. They viewed the photoplay as well as the stage play on which it was based. They also had a copy of the stage play. [R. 62-63, 69-70.] Comparison of the infringing television play [Exs. 8, 10] with the motion picture [Exs. 2, 3] leaves no room for doubt that the former was copied from the latter.³ If the material taken by appellants from "Gas Light" is eliminated there is left only a few pointless "gags" and some incoherent and disconnected dialogue, telling no discernible story. [Appendix A, *infra*.] On the other hand, if the material which did not come from the photoplay is taken out of the television play, what is left is the photoplay—its plot, story, principal incidents, and virtually identical sequence of events. [Appendix B, *infra*.]

Notice was given appellants of the exclusive rights claimed by Loew's, well in advance of the infringement now complained of. This action followed promptly upon the discovery by Loew's that appellants intended to repeat a prior infringement of the photoplay copyright. [R. 65-68.]

Summary of the Argument.

The District Court's finding of fact, that appellees copied and inserted in their filmed television play substantial parts of appellee's copyrighted motion picture

³The appendices to this brief consist of: A: The television play [Ex. 10] with the material taken from the photoplay deleted. B: The television play with the new material inserted by appellants deleted. Summaries of the infringed and infringing works and an analysis of the pronounced similarities between them will be found in the record. [R. 17-22.]

photoplay, is supported by substantial evidence. The copying is virtually admitted. The substantiality of the parts pirated is established by their importance in both the infringed and infringing works. Without those parts neither work would tell any recognizable story or be anything more than a few unrelated and incoherent incidents.

The fact that appellants were purporting to parody or burlesque the photoplay does not establish any defense of fair use. Wholesale copying of copyrighted material is not fair use. Even if it could be, the defense would not be available here because the copying has pre-empted the market and to a considerable extent satisfied the public demand for a comic or burlesque version of appellee's photoplay; and because it has enabled and will enable appellants to compete with appellee's motion pictures for the attention and patronage of the entertainment seeking public.

The exclusive right to reproduce the copyrighted work in any form, conferred by the Copyright Act, cannot be limited or impaired by an alleged custom to parody or burlesque such works. Custom cannot vary or alter a statute. Were the rule otherwise, the evidence here is insufficient to bring about any such effect upon the Copyright Act since it does not show either the universality of the custom or the fact that it has been practiced in a way which, but for the custom, would have been an infringement.

To permit the defense of fair use in the breadth which appellants demand would give to the parodist a preferred position over all other authors. He, and he alone, would be entitled with impunity to practice his art by the bald appropriation of the substantial and protected material of other authors. No sound policy or reason exists for the creation of such a discriminatory rule.

ARGUMENT.

I.

The Finding of Substantial Copying Is Supported by Substantial Evidence and Compels the Conclusion of Copyright Infringement. That Is True Regardless of the Form or Mode in Which the Pirated Material Is Used by the Infringer.

Appellants specify the findings of substantial copying as erroneous. [App. Op. Br. 6.] The fact is that they are supported by substantial evidence and, therefore, are not clearly or at all erroneous. [F. R. C. P., rule 52(a); *Universal Pictures Co. v. Harold Lloyd Corp.*, *supra*, 162 F. 2d at 378; *Lincoln Nat. L. Ins. Co. v. Mathisen*, 9 Cir., 150 F. 2d 292, 296.]

First: That there was *copying* appellants do not deny. In effect they baldly admit copying when they say that their writers “necessarily had to use the recognizable elements of ‘Gas Light’ . . .” [App. Op. Br. p. 9.] Even if that were not so, a denial of copying could not survive comparison of the two works. Appellants have taken from the photoplay, not alone the general theme or idea, but the major sequences and details by which that idea is developed and the story told and upon which all else in the picture depends.

The motion picture tells of a man who sets out upon a deliberate plan to drive his wife insane. He is motivated in this endeavor by the need of having access to a house owned by his wife, in which, for the sake of some valuable jewels he intended to steal, he had committed a murder. His method of achieving his end is to induce in his wife the belief that she is having hallucinations and suffering serious lapses of memory. He does this by causing the

dimming of the gaslights in the home at night and the making of strange sounds, at times when presumably there was no one else in the house to account for them; and by abstracting articles trusted to his wife and by removing a portrait from the walls, making her believe that she was responsible but had forgotten. He fosters that belief, in part, by causing the servants to bear witness that they did not remove the portrait. The suspense aroused by the picture—and its whole point—is whether he will succeed in his scheme. He does not, because of the intervention of a Scotland Yard detective who has become, first interested in, and then obviously enamoured of, the heroine. The detective apprehends the husband at the climax of his plot, ties him to a chair and then reveals the truth to the wife. At her request she is given an opportunity to talk to the malefactor who attempts once again, through his personal charm, to subdue her to his will. She resists his blandishments. In this scene, the wife, at her husband's request, takes a knife which he has kept nearby. Suspense is heightened here by the question whether the wife will use the knife to cut the husband's bonds or to kill him. She does neither but contents herself with denouncing him.

The appellants' play, in considerably compressed form, tells substantially that story. To be sure, it is played for farce or broad comedy rather than serious drama or melodrama, but it is nevertheless the same story. What was used by appellants was not alone the general or abstract conception of a husband who seeks to drive his wife insane by causing her to believe that she suffers from hallucinations and loss of memory and who is prevented from accomplishing that purpose by some extraneous intervention. It is that conception, developed and expressed in the same way, by the same incidents and sequence of

events, and with the same motivation, that has been appropriated.

Second: The parts so taken were *substantial*. Whether in any case a taking has been substantial is determined qualitatively rather than quantitatively. The criterion is not amount, but literary or dramatic value in the context of the copyrighted work. The controlling rule in this regard was laid down almost with the beginning of copyright law in this country in *Folsom v. Marsh*, C. C. Mass., 9 Fed. Cas. 342, 348 (Case No. 4901) and *Story v. Holcombe*, *supra*, 23 Fed. Cas. at 173, when it was said, quoting from the latter, that infringement “does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages they take from it that in which its chief value consists. . . .”

Concrete instances of the application of this rule are not few in number. An example from this Circuit is *Universal Pictures Co. v. Harold Lloyd Corp.*, *supra*, 162 F. 2d at 360, in which a taking of one sequence, comprising in length about 20% of the copyrighted motion picture, was held to be substantial because it was “intimately tied into the story, and [was] a main source of comedy for the picture as a whole. . . .” [See, also, *Warner Bros. Pictures v. Columbia Broadcasting System*, 9 Cir., 216 F. 2d 945, 950.] Similarly, in *De Acosta v. Brown*, 2 Cir., 146 F. 2d 408, 410, a fictional love interest interpolated into an otherwise factual story of Clara Barton intended for screen use, even though it was only a small part of the copyrighted work, was held to be sufficiently substantial to make its appropriation infringement, because it was an important element in stories designed for the motion picture public. Again, in *Henry*

Holt & Co. v. Liggett & Myers Tob. Co., E. D. Pa., 23 F. Supp. 302, 303, the quotation in a cigarette advertisement of only three sentences from a medical treatise was held to be a substantial taking, notwithstanding it was such a small part of the protected work. It was held substantial because it represented most of what was pertinent in the treatise to the subject of the ad; and because it formed a much larger part of that ad. [To the same general effect, see: *Toksvig v. Bruce Pub. Co.*, 7 Cir., 181 F. 2d 664, 667; *Harms v. Cohen*, E. D. Pa., 279 Fed. 276, 278; *Johns & Johns P. Co. v. Paull etc. Corp.*, 8 Cir., 102 F. 2d 282, 283; *Warren v. White etc. Mfg. Co.*, S. D. N. Y., 39 F. 2d 922, 923.]

Of course, it follows from cases such as those cited above that it is not necessary to a finding of infringement that all or even the greater part of the plaintiff's work shall have been taken. It is enough that a qualitatively substantial part has been copied. [In addition to the cases already cited, see: *M. Whitmark & Sons v. Pastime Amuse. Co.*, E. D. So. Car., 298 Fed. 470, 476; *Towle v. Ross*, D. C. Ore., 32 F. Supp. 125, 127; *Reed v. Holliday*, W. D. Pa., 19 Fed. 325, 327.]

These principles make inescapable the conclusion that appellees' copyright was infringed by appellants. Were the copied material eliminated from the photoplay, appellees would have no story left. Eliminated from the television play the same result would follow. [Appendix A, *infra*.] By all of the tests prescribed in the decisions to which we have referred, the parts thus taken must be classed as protectible and substantial. Just as in *Universal Pictures Co. v. Harold Lloyd Corp.*, *supra*, 162 F. 2d at 360, the one sequence copied was substantial because it was "intimately tied into the story, and [was] a main

source of comedy for the picture as a whole” so here the gaslight, picture, and apprehension sequences are substantial because they are so intimately tied into the story and are the main source of suspense and plot development for the picture as a whole. And, just as in *Folsom v. Marsh, supra*, 9 Fed. Cas. at 348-349, the part taken was substantial because without it the appropriator would have had no work left, so here the copied sequences are substantial because without them the defendants would have had no play.

Third: The defense of this appropriation seems to be that what was taken was presented as burlesque or parody and since the latter are separate “art forms” there has been a fair use. The legal fallacies in that defense will be dealt with shortly. [Point II, *infra*.] For the moment, it may be pointed out that the assertion that burlesque or parody is a separate form intensifies rather than palliates the infringement. Novels, dramas, translations and the like are themselves separate art forms at least to the same extent as burlesque or parody. Yet it would never occur to any one to argue that because of that fact a dramatist could with impunity dramatize a copyrighted novel, or that a novelist could novelize a copyrighted drama. The test of infringement must in every case be the substantiality of the material taken, not the *mode or form* in which the appropriations are used. The protection secured by the Copyright Act extends to all of “the various modes in which the matter of any publication may be adopted, imitated or transferred . . .” not just to imitation of the particular mode in which the

original work was presented. [*Nutt v. National Institute*, 2 Cir., 31 F. 2d 236, 238; *Universal Pictures Co. v. Harold Lloyd Corp.*, *supra*, 162 F. 2d 361; *Falk v. Donaldson*, *supra*, 57 Fed. at 36-37.]

The whole purpose of the Copyright Act is to secure to an author, for a limited term, the *exclusive* right to reproduce and disseminate his work in every form and by every method of which it is capable. The very fact that burlesque or parody is a separate art form, if it is, demonstrates that by translation of a work into that form one of the important rights of the copyright owner has been appropriated; for it is then a form or mode into which he could himself have translated the work and in the exclusive right to which his copyright secured him.

Illustrative of this proposition is *Universal Pictures Co. v. Harold Lloyd Corp.*, *supra*, 162 F. 2d at 374, in which it was held that one of the rights secured by copyright of a motion picture photoplay was the right to *remake it* “. . . in whole or in part . . . in any manner or by any method [by which it could] be exhibited, performed, represented, produced, or reproduced . . .” Also analogous is *King Features Syndicate v. Fleischer*, 2 Cir., 299 Fed. 533, 535-536, holding a copyright in a comic strip character infringed by its reproduction as a doll, and saying that the copyright proprietor “is entitled to any lawful use of his property, whereby he may get a profit out of it . . .” [To the same effect, *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 2 Cir., 73 F. 2d 276, 278, *cert. den.* 294 U. S. 717.] So too, a copyright

of a piece of statutory is infringed by its reproduction and incorporation into a lamp, and this notwithstanding that utilitarian objects as such cannot be copyrighted. [*Stein v. Rosenthal*, *supra*, 103 F. Supp. at 231, *affirmed*, 205 F. 2d 633; *Stein v. Mazer*, 4 Cir., 204 F. 2d 472, 477-480, *affirmed*, *Mazer v. Stein*, 347 U. S. 201.] And quite appositely, in *Hill v. Whalen & Martell*, S. D. N. Y., 220 Fed. 359, 360, a *dramatization* of the copyrighted "Mutt and Jeff" cartoon characters was held an infringement notwithstanding the defense that the dramatic imitation "was a mere parody or burlesque of the original, and was so intended." [See, also, *National Comics v. Fawcett Publications*, 2 Cir., 191 F. 2d 594, 603, holding that a cartoon copyright could be infringed by a motion picture dramatization of the comic strip.]

It can be of no avail to the appellants, therefore, that their plays are burlesque whereas appellees' picture is serious drama. The right to transform that drama into burlesque, if so desired, was exclusively the copyright owner's, and it is immaterial that it may not yet have exercised that right. ". . . The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property . . ." [*Fox Film Corp. v. Doyal*, 286 U. S. 123, 127; *Leon v. Pacific T. & T. Co.*, *supra*, 91 F. 2d at 487.] By appropriating appellees' material the appellants have not only violated that right of exclusion, but they have to a considerable extent preempted whatever market there might be for a burlesqued or humorous version of "Gas Light," and thus have seriously impaired the additional right inhering in Loew's copyright to transfer its own material into any mode or form of which it is susceptible.

II.

The Doctrine of Fair Use Is Not Applicable.

A. Appropriation of Substantial Copyright Material Cannot Be Justified Because the Material Is Used as Parody or Burlesque.

The attempt to defend against copyright infringement by the claim that the infringing work was “merely a parody or burlesque” is not new. Such an attempt has been the subject of several decisions and has been disposed of, not by determining whether the alleged infringing use was parody or burlesque, but by ascertaining whether it amounted to a taking of substantial, copyrightable material. In other words, a parodied or burlesqued taking is treated no differently from any other appropriation.

The dividing line between permissible and nonpermissible parody is strikingly illustrated by two of the cases which are found immediately next to each other in the reports—*Green v. Minzenheimer*, C. C. N. Y., 177 Fed. 286, and *Green v. Luby*, C.C. N. Y., 177 Fed. 287, 288. In the first of these cases, a parodied imitation of an actress’ manner or style of singing a song, but in which no copyrighted material owned by the plaintiff was used, was held nonactionable. On the other hand, in the *Luby* case, where, in addition to mimicry or parody of the mannerisms of an actress who frequently sang it, a copyrighted song was sung, infringement was found. The Court said:

“The next question is one of infringement. The defendant admits that she sings the copyrighted song

with musical accompaniment, but she says that she does so merely to mimic the complainant Irene Franklin Green. She contends that she gives impersonations of various singers, including said complainant, and, as incidental to such impersonations, sings the songs they are accustomed to sing. The mimicry is said to be the important thing; the particular song, the mere incident. But I am not satisfied that, in order to imitate a singer, it is necessary to sing the whole of a copyrighted song. 'The mannerisms of the artist impersonated,' to use the language of the defendant's brief, may be shown without words. And if some words are absolutely necessary, still a whole song is hardly required. And if a whole song is required, it is not too much to say that the imitator should select for impersonation a singer singing something else than a copyrighted song.

"*Bloom v. Nixon* (C.C.) 125 Fed. 977, is distinguishable in that in that case the chorus only of the copyrighted song was sung. *Green v. Minzenheimer* (decided by this court March 19, 1909), 177 Fed. 286, is distinguishable in that in that case the defendant imitated the singer without musical accompaniment, and the testimony as to just what she did was not clear."

Bloom & Hamlin v. Nixon, C.C. Pa., 125 Fed. 977, 978-979, as the foregoing excerpt indicates, was a case in which no infringement was found because only a small part, *i. e.*, an unsubstantial amount, of copyrighted material was used, the principal part of defendant's performance being an imitation of the singing manner and stage business of an actress who had made the song popular and with those stylized rendition of it the words had be-

come inseparably connected.⁴ Significantly, however, the Court pointed out that "if it appeared that the imitation was a mere attempt to evade the owner's copyright, the singer would properly be prohibited from doing in a round-about way what could not be done directly . . ."

Another parody case is *Hill v. Whalen & Martell, supra*, 220 Fed. 359, in which, as we have seen, a dramatization of a cartoon strip was held to infringe notwithstanding that it "was a mere parody or burlesque of the original, and was so intended."⁵

⁴Obviously there is no such inseparable connection between the general theme or plot of "Gas Light" and the detailed incidents by which that theme was developed and expressed, as to require in a parody of the former a substantial use of the latter. Permissible parody could have been accomplished without taking the short-cut of appropriating plaintiff's copyrighted material.

⁵While not directly on the point, *M. Witmark & Sons v. Pastime Amuse. Co., supra*, 298 Fed. at 479, is helpful because of its restatement of the rule established by the *Bloom*, *Minzenheimer*, and *Luby* cases; and because of its rejection of the argument, attempted to be drawn from them, that the rendition of a song to accompany an exhibition of a motion picture "merely as a vehicle to 'put the picture across' . . ." was not an infringement of copyright in the song. In this latter connection the Court said:

" . . . If such use were permitted, the thousands of moving picture shows throughout the country could use the very best portions of copyrighted songs for their own benefit, until the public were thoroughly tired of hearing them, and the owners would have little left of any value. I cannot think the Congress intended any such result."

B. Fair Use Is Based on Implied Consent and the Absence of Any Tendency to Supplant or Compete With the Appropriated Work. It Cannot Be Found Here Because the Requisite Consent Cannot Fairly Be Implied in View of the Invasion of Appellees' Right of Exclusion and the Direct Competition Between Television and Motion Pictures.

First: No right to make the infringing use here shown can be derived from the doctrine of fair use properly so-called.⁶ When that doctrine is applicable its effect is to permit a limited, reasonable use of another's copyrighted material; but it is only applicable in those cases in which the use is of a sort for which the copyrighted publication was designed, from which fact consent to the making of such a use may be fairly implied. Thus, a scientific treatise is designed to be employed by those who are themselves engaged in teaching or working in the field. Accordingly, relatively small parts of it may be quoted or used by another writer in the same field, so long as the taking is not substantial, and the rights of the original author are not injuriously affected or the objects of his work superseded. [*Henry Holt & Co. v. Liggett & Myers Tob. Co.*, *supra*, 23 F. Supp. at 304; *Sampson & Murdock Co. v. Seaver-Radford Co.*, 1 Cir., 140 Fed. 539, 541; *Mathews Conveyor Co. v. Palmer-Bee Co.*, *supra*,

⁶Occasionally, the Courts have referred to the right to use the *non-copyrightable* material in a copyrighted work as "fair use." [*Sheldon v. Metro-Goldwyn Pictures Corp.*, *supra*, 85 F. 2d at 54; *Towle v. Ross*, *supra*, 32 Fed. Supp. at 127; *Warner Bros. v. Columbia Broadcasting System*, S. D. Cal., 102 F. Supp. 141, 148-149.] In that meaning the question is only the conventional one in copyright cases, *i. e.*, was the appropriated material copyrightable. Primarily, however, the concept referred to as "fair use" relates to the extent to which *copyrightable* or protectible material may be used without express license.

135 F. 2d at 85; *Lawrence v. Dana*, *supra*, 15 Fed. Cas. at 60-63; *Macmillan Co. v. King*, D. C. Mass., 223 Fed. 862, 866; *Baker v. Selden*, 101 U. S. 99, 102-103.] Similarly, a dictionary may be appropriately quoted, because its very purpose is to supply its readers with usable definitions; but, of course, such quotation would not be permitted in a competing dictionary. [*Webb v. Powers*, C.C. Mass., 29 Fed. Cas. 511, 516-517 (case No. 17323). See, also: *American Institute of Architects v. Fenichel*, S. D. N. Y., 41 F. Supp. 146.]

In the case of literary or dramatic works, as distinguished from utilitarian compilations or learned treatises, about the only fair use which has been recognized is the privilege of making reasonable, illustrative quotations in a *bona fide* review or criticism [*Folsom v. Marsh*, *supra*, 9 Fed. Cas. at 344-345; *New York Tribune v. Otis & Co.*, S. D. N. Y., 39 F. Supp. 67, 68; *Hill v. Whalen & Martell*, *supra*, 220 Fed. at 360], or in a factual or historical study of one with whom a copyrighted work has become so associated as to make it a biographical or historical fact. [*Broadway Music Corp. v. F-R Pub. Corp.*, S. D. N. Y., 31 F. Supp. 817; *Karll v. Curtis Pub. Co.*, E. D. Wis., 39 F. Supp. 836, 837.] No use, however, is fair if as a result of it the second author has done little more than "to save time, trouble and expense by availing himself of another's copyrighted work for the sake of making an unearned profit . . ." [*Conde Nast Publications v. Vogue School*, S. D. N. Y., 105 F. Supp. 325, 333; *Leon v. Pacific T. & T. Co.*, *supra*, 91 F. 2d at 486-487; *Toksvig v. Bruce Pub. Co.*, *supra*, 181 F. 2d at 667; *Lawrence v. Dana*, *supra*, 15 Fed. Cas. at 62; *Simmons v. Stanton*, *supra*, 75 Fed. at 10; *Reed v. Holliday*, W. D. Pa., 19 Fed. 325, 327; *West Pub. Co. v. Edw. Thompson Co.*, E. D. N. Y., 169 Fed. 833, 843,

modified, 2 Cir., 179 Fed. 833, 838; *Marx v. United States*, 9 Cir., 96 F. 2d 204, 207.]

The general tenor of all of the decisions on the subject is shown by excerpts from two of them—*Henry Holt & Co. v. Liggett & Myers Tob. Co.*, *supra*, 23 F. Supp. at 303-304, and *Leon v. Pacific T. & T. Co.*, *supra*, 91 F. 2d at 486-487. In the first of these it was said:

“In order to constitute an infringement of the copyright of a book it is not necessary that the whole or even a large portion of the book shall have been copied. It is sufficient if a material and substantial part shall have been copied, even though it be but a small part of the whole . . .

* * * * *

“Nor do we think that the infringement complained of is excused upon the ground that the defendant was making no more than a fair use of Dr. Felderman’s work. It is true that the law permits those working in a field of science or art to make use of ideas, opinions, or theories, and in certain cases even the exact words contained in a copyrighted book in that field. *Sampson & Murdock Co. v. Seaver-Radford Co.*, 1 Cir., 140 F. 539. This is permitted in order, in the language of Lord Mansfield in *Sayre v. Moore*, 1 East. 361, 102 Eng. Reprint 139, ‘that the world may not be deprived of improvements, nor the progress of the arts be retarded.’ In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art.”

And in the *Leon* case, from this Circuit, the following appears [*italics ours*]:

“It is not necessary in the case before us to discuss generally the question of what constitutes ‘fair

use.' Obviously, every publication copyrighted admits of many uses which do not constitute infringement. Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that *wholesale copying and publication of copyrighted material can ever be fair use . . .*"

Since the basis of the doctrine of fair use is implied consent it follows that it is never applicable in circumstances which would make it unfair or unreasonable to imply such consent. So, when the alleged fair use is in a work which may supplant or *compete* with the original, a substantial taking from the latter cannot be and is not permitted. That proposition necessarily derives from the frequently repeated statement in the decisions that an important criterion of fair use is the extent to which the second work may tend to supersede the objects of or diminish the profits from the original. In several of the cases, the importance of the competitive element has been specifically articulated, especially where, in finding fair use, the absence of competition was emphasized. [See, for example: *W. H. Anderson Co. v. Baldwin*, 6 Cir., 27 F. 2d 82, 89; *Karll v. Curtis Pub. Co.*, *supra*, 39 F. Supp. at 837; *Sampson & Murdock Co. v. Seaver-Radford Co.*, 1 Cir., 140 Fed. 539, 541-542.]

On the other hand, the mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial. That principle has been well stated in this Circuit in *Leon v. Pacific T. & T. Co.*, *supra*, 91 F. 2d

at 486-487, as we have seen; while others to the same effect are: *Falk v. Donaldson*, *supra*, 57 Fed. at 36-37; *Reed v. Holliday*, *supra*, 19 Fed. at 327; *Warren v. White etc. Mfg. Co.*, S. D. N. Y., 39 F. 2d 922, 923; *Johns & Johns P. Co. v. Paull etc. Corp.*, *supra*, 102 F. 2d at 283; *Harms v. Cohen*, E. D. Pa., 279 Fed. 276, 279; *Macmillan Co. v. King*, *supra*, 223 Fed. at 867-868.

Second: The foregoing decisions dispose of any claim of fair use at bar. Here, we do not have a case of an unsubstantial taking, but a substantial one and, therefore, a clear violation of plaintiff's right of exclusion. We have, in addition, a clear case of the saving of defendants' time, trouble and expense in accomplishing their own commercial purpose by the simple expedient of taking ready-made the results of plaintiff's extensive and costly labors. Obviously, it would have been a much more difficult and expensive job for them to have created an *original* and noninfringing parody of "Gas Light" had they been compelled to originate and write their own incidents and sequence of events instead of taking the plaintiff's material. To paraphrase only slightly some directly applicable language from *Toksvig v. Bruce Pub. Co.*, *supra*, 181 F. 2d at 667, it is clear that the defendants obtained much value from the use in their work of many of the original concepts and ideas of plaintiff and were enabled to finish their plays in much less time. Such a use cannot be held fair and not an infringement.

Most importantly, however, the circumstances of the instant case prevent any implication of a consent to the use which has been made. It is common knowledge that television and motion pictures are directly competitive; and that the advent of the former has had a seriously detrimental effect upon the revenues of the latter. Many

people, who otherwise might be in a motion picture theater, now stay at home to view without cost such extremely popular and able performers as the appellant Benny.

It is the height, not only of unfairness, but of absurdity, we respectfully submit, to say that Loew's has impliedly consented to the free use of the photoplay, which it produced by extensive and expensive effort, in order that more people may be induced to stay home in preference to attending a movie. Yet, that is exactly what must be said if fair use is to be found. Television generally and the appellants specifically, of course, have the right to compete with the motion picture industry and with Loew's. But their competition for the patronage of the entertainment public must be fair and the product by which they compete must be their own, not the unauthorizedly appropriated property of those with whom they are competing.

C. The Authorities Upon Which Appellants Rely Do Not Support Their Position.

The authorities and decisions upon which appellants base their argument do not require any retreat from the principles which we have discussed. Most certainly they do not require any change from the analysis of fair use which this Court made in *Leon v. Pacific Tel. & Tel. Co.*, *supra*, 91 F. 2d at 486-487.

First: Strong reliance is placed by appellants on *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261, a decision of Mr. Justice Younger, a British trial Judge, not reviewed on appeal. What was there said on the subject of parody was dictum, based on premises which have been rejected in this country as well as in England. The dictum itself has been criticized and repudiated.

The only point actually decided in the *Glyn* case was that the amount of *copyrightable* material taken from the plaintiff's work was of such a trifling nature as not to be substantial. The references to burlesque, therefore, were clearly *obiter*. All this appears from Younger, J.'s opinion. First, he summarizes the plaintiff's story and then comments as follows:

"In all its essentials the so-called episode is as hackneyed and commonplace a story as could well be conceived. If it is to be distinguished at all from innumerable anticipations in erotic literature, the distinction is to be found in the accessories of the tale . . . At the best, the plaintiff has chosen a hackneyed theme for her episode, and her privilege as an authoress must be strictly confined to the method of treating it which she has adopted." ([1916] 1 Ch. at 266-267.)

He next synthesizes the allegedly infringing motion picture, emphasizing its striking and substantial difference in plot, incidents, details and treatment from the *Glyn* novel; and then comments in this vein:

". . . the incidents of the film to which even so remote a resemblance with any in the novel can be found are *exceedingly few in number or importance*. The great bulk of the film is taken up with happenings which have no counterpart in the novel; a great part of the novel is taken up with other incidents which have no counterpart in the film; on the whole . . . I have arrived at the *conclusion of fact* that the film does not constitute any infringement of the plaintiff's copyright in the novel." ([1916] 1 Ch. at 267-268. Italics ours.)

Finally, as showing that he himself recognized that what followed was *obiter dictum* and not a decision of

the point, the learned Justice introduced his discussion of burlesque with this sentence:

“This view of the case makes it unnecessary that I should do more than refer in passing to the important point raised by the defendants that their film is a mere burlesque of the plaintiff’s novel, and that a genuine burlesque of a serious work constitutes no infringement of copyright, although it may under certain conditions justify an action in the nature of slander of goods.” ([1916] 1 Ch. at 268. *Italics ours.*)

The law of fair use in England is correctly reflected in the following quotation from the leading encyclopedia of British law—7 Halsbury’s Laws of England (2d ed. 1932, edited by Lord Hailsham) 567, sec. 893:

“Copyright is a proprietary right, and its infringement is actionable without proof of damage; if, therefore, a substantial part of an author’s work is taken, it is not material to consider whether the user is fair or unfair, or whether the two publications are, or are not, likely to enter into competition with one another”

To this statement is appended, as a footnote, the following illuminating comment on the *Glyn* case:

“. . . Younger, J., in *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261 at p. 268 . . . suggested that a burlesque would not be an infringement of the copyright in a play on which it was based if the defendant had bestowed such mental labor upon what he had taken and had subjected it to such revision as to produce an original result . . . Younger, J.’s view (*supra*) was not the basis of his judgment. It would appear that at any rate since the commencement of the Copyright Act, 1911

(1 and 2 Geo. 5, c. 46), whereby reproduction in any material form was made an infringement of copyright there can be no justification for a user of copyright material based upon a supposed right to abridge or burlesque. A burlesque may, of course, be no infringement because it does not reproduce any of the incidents of the play burlesqued, but only the plot in which there is no copyright . . .”

Leading English copyright authorities agree. For example, in Copinger & Skone James, *Law of Copyright* (8th ed. 1948), pages 129, 131-132, it is said:

“It is thought that the question whether abridgments [etc.] infringe copyright must now depend upon the answer in each case to the question whether the production has involved a *substantial use of copyrighted material* or only of ideas and information . . .

* * * * *

“Similar considerations seem to arise whether a burlesque can be an infringement. If the burlesque consists of what is, in substance, a new work parodying an existing one but not making substantial use of its language or incidents, it is submitted there is no infringement. But a work which slavishly used the plot and incidents of another *would not be defensible under the cloak of burlesque.*” (Italics ours.)

Similarly, in Clarke, *Copyright and Industrial Design* (1951), page 63, after citing *Carlton v. Mortimer*, McGillivray’s *Copyright Cases* (1917-23) 194,⁷ the comment is:

“The Court held that these two incidents did not constitute a substantial part of the novel, especially

⁷Also cited by appellants and discussed by us in a moment.

in view of the fact that whereas the incidents in the novel were serious in nature, in the skit they were treated entirely as burlesque. This case raises the question of whether a burlesque can infringe a serious work. It is submitted that *it may be an infringement*, the material question for consideration being whether a 'substantial part' of the copyright work is or is not reproduced. [Citing the *Glyn* case.]” (Italics ours.)

In dealing with the extent to which bona fide criticism may go, Clarke says, *op. cit.*, page 83:

“ . . . the decision would depend, it is thought, upon the nature of the publication, *i. e.*, upon whether the object of the newspaper was genuinely to criticize the works, or whether under guise of criticism the real object was unfairly to derive profit from the reproductions as such. Whether a burlesque could constitute a fair dealing⁸ for the purposes of criticism cannot be answered in the abstract, but must also, it is thought, depend upon similar principles applied to the particular case.”⁹

Justice Younger's conclusion regarding burlesque was based upon two supposed rules of law, *neither of which is recognized in this country*. It necessarily follows that

⁸The English term for what we call “fair use.” It is expressly recognized in the English Copyright Act of 1911 [1 & 2 Geo. 5, c. 46, sec. 2(1)] whereas, significantly enough, burlesque or parody, notwithstanding its long history, is not.

⁹We cannot believe that it is seriously claimed in the case at bar that the appellants' burlesque was primarily or at all intended to be a dramatic criticism or review of “Gas Light” rather than a means by which they could derive profit for themselves. If review is the purpose, why is appellants' telecast of 1952 sought to be repeated this year—especially since “Gas Light” has not been shown in the interim?

his conclusion cannot be accepted here, whatever may be the situation in England.¹⁰

In the first place, the Justice commented upon the to him remarkable fact that “no case can be found in the books in which a burlesque even of a play has been treated as an infringement of copyright . . .”¹¹ ([1916] 1 Ch. at 268.) He was apparently unaware of the American cases, decided several years before, in which burlesques had been “treated as an infringement of copyright.” [*Green v. Luby*, *supra*, 177 Fed. 287 (1909); *Hill v. Whalen & Martell*, *supra*, 220 Fed. 359 (1914). See, also, *Bloom & Hamlin v. Nixon*, *supra*, 125 Fed. 977, 979 (1903), in which, although no infringement was found, it was clearly pointed out that burlesque could infringe.]

In the second place, and perhaps even more important, the two rules, which accounted in Justice Younger’s mind for the supposed absence of such cases, are not law in this country, and certainly they are not in this circuit. These two rules were (1) the requirement, which he believed was imposed by some early English cases, of establishing as an essential element of infringement “that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work . . .”; and (2) the principle that “no infringement of the plaintiff’s rights takes place where a defendant has bestowed such mental labour upon what he has

¹⁰His premises were erroneous even in England, as we shall demonstrate shortly.

¹¹Contrast the statement of the Ninth Circuit in *Leon v. Pacific T. & T. Co.*, *supra*, 91 F. 2d at 486-487, that neither counsel nor the Court were able to find a single case “to support the proposition that wholesale copying and publication of copyrighted material can *ever be fair use* . . .” (Italics ours.)

taken, and has subjected it to such a revision and alteration as to produce an original result . . .” The cases cited at Point II, A, B, *supra*, demonstrate that neither of these propositions is good law in this country.

Proof of that fact is *Leon v. Pacific T. & T. Co.*, *supra*, 91 F. 2d 484, in this circuit. There, it will be recalled, the defendant had taken the plaintiff's copyrighted telephone directory (which was of the conventional type, listing subscribers alphabetically by name) and from it had compiled a directory listing telephone numbers in numerical order, from which the name and address of the subscriber could be obtained. Obviously, this inversion must have required a great deal of labor and certainly it produced an original result, at least in the sense of providing a directory which served an entirely different purpose and filled a quite different need from plaintiff's publication, which need the plaintiff had not sought to supply. Thus we see in this case the materials for the argument that there was no infringement of copyright because the object of the plaintiff's work had not been superseded nor its sales diminished and because an original result had been produced by the defendant's labors in transforming the copyright material into different form. *See also, Shapiro*

In reaching that result this Court relied heavily upon *Wetherby & Sons v. International House Agency* [1910], 2 Ch. 297, and *H. Blachloch & Co. v. C. Arthur Pearson, Ltd.* [1915], 2 Ch. 276. These cases are of additional interest here because they prove that the *Glyn* dictum was based upon an erroneous view of even the law of England. They clearly show, as does *Hanfstaengl v. Empire Palace* [1894], 3 Ch. 109, which appellants also cite, that in that country, just as in America, neither absence of injury or competition nor expenditure of effort by the defendant

is a defense to copyright infringement when substantial parts of the copyrighted work have been taken. [See, also, 7 Halsbury's Laws of England, *supra*, p. 567, sec. 893.]

Second: What has been said to this point applies with equal force to the remaining English cases cited by appellants, *i. e.*, *Carlton v. Mortimer*, *supra*, McGillivray's Copyright Cases (1917-23) 194,¹² and *Hanfstaengl v. Empire Palace*, *supra*, [1894] 3 Ch. 109. A few additional comments directed particularly to those decisions may be appropriately made.

In *Carlton*, the defendant had for years performed an original comic acrobatic skit. After the publication of "Tarzan and the Apes" he inserted into that skit two incidents, similar to two which appeared in the Tarzan novel. In finding no infringement, the court, judging from McGillivray's report, took care to point out that the mere fact of use as burlesque would not necessarily or always defeat a charge of infringement but that in the specific case before it "burlesquing of two *trifling* incidents and the production of the performance under a title which was somewhat similar in sound to, but *different in fact* from, the title of the novel did not amount to an infringement . . ."¹³ (Italics ours.) Manifestly, decision in that case was governed by the unsubstantiality

¹²The report of this case is merely an abstract prepared by the editor of the case-book. It does not purport to be a verbatim transcript of the Court's opinion. In fact there does not seem to have been any formal opinion in, or official report of, the case, since it is not to be found in any of the English case reports.

¹³Copyright does not extend to protection of the title of a work. [*Arnstein v. Porter*, 2 Cir., 154 F. 2d 464, 474; *Warner Bros. Pictures, Inc. v. Majestic Pictures Corp.*, 2 Cir., 70 F. 2d 310, 311, and cases there cited.]

of the taking, not by any rule that burlesque as such is fair use.

The *Hanfstaengl* case has little, if anything, to do with our problem.¹⁴ There, the plaintiff was the owner of German copyrights in some paintings. These paintings were more or less reproduced as live tableaux in a theatrical presentation. The tableaux, it was held in prior litigation, did *not* infringe Hanfstaengl's copyright. [*Hanfstaengl v. Empire Palace*, [1894] 2 Ch. 1.] In the subsequent case, the complaint was based on the publication, in defendant's newspapers, of rough sketches, not of the *original paintings*, but of the *tableaux*. The sketches had been made from a view of the tableaux on the stage and were apparently published either as criticism or as a news account of the theatrical production, although in this respect the report of the case is not clear.

The decision that there was no infringement was based on the proposition that these sketches were not copies of the original paintings but were, at best, merely a rough reproduction of their general outlines; in short, that the *copyrightable* elements of the paintings had not been copied.¹⁵ Lord Justice Lindley's comment, which appellants italicize [App. Op. Br. 38], that the pictures were

¹⁴It was decided twenty-two years before the *Glyn* case; and it was known to Justice Younger since he cited it in the *Glyn* opinion. Yet he said, it will be remembered, that he had found no case in the books dealing with burlesque as an infringement of copyright. Obviously, not even Justice Younger thought that the *Hanfstaengl* case dealt with the problem of burlesque. The case is important, however, as showing the error of his belief that diminution of the sale of the copyrighted works or some similar injury is necessary to a cause of action for infringement.

¹⁵From the standpoint of strict analysis all that can properly be said to have been decided is that a copy, of a copy which is not itself an infringement of the original, does not infringe, at least when its resemblance to the original is slight and remote.

“made for a very different purpose” must be read in the context of another comment which he made and which appellants do not quote:

“ . . . I do not think that the competition test is necessarily conclusive. I agree that if the Defendants had copied the Plaintiff’s pictures they would have infringed his rights, even although the use made by the Defendants of such copies in no way compete with the sale of the Plaintiff’s pictures . . . ”¹⁶

Lord Justices Lopes and Davey (the other two judges participating in the *Hanfstaengl* case) agreed that the sketches complained of were merely rude reproductions of the general outlines of the copyrighted pictures and not, therefore, copies of their copyrightable elements. They reached this conclusion, as one of *fact*; not on any theory of law that parody was fair use. Actually, there is nothing in the opinions in that case to indicate that any question of parody or burlesque was raised, argued, considered or decided.

Third: Appellants’ references to text-writers are no stronger than the decisions to which they have referred. For example, the authority upon which the quotation from 13 C. J. 1113, 1118 [App. Op. Br. 41] is based in that work is the *Glyn* case. Manifestly even that decision, forgetting its *obiter* and otherwise criticizable character, does not stand for any broad or unqualified rule that burlesque may not or cannot be an infringement.

The quotation from Weil, Copyright Law, p. 432 [App. Op. Br. 42] is in no better case. In support of the

¹⁶That, of course, coincides exactly with the reasoning of this Court in *Leon v. Pacific Tel. & Tel. Co.*, *supra*, 91 F. 2d at 486-487, where it refused to find fair use even though the infringer’s work served a different and non-competing purpose from that of the original.

quoted statement Weil cites *Hill v. Whalen & Martell, Inc.*, *supra*, 220 Fed. 359, *Bloom & Hamlin v. Nixon*, *supra*, 125 Fed. 977, and *Story v. Holcombe*, *supra*, 23 Fed. Cas. 171. In the first of these cases, as we have seen, a dramatization of a cartoon strip was held to infringe copyright notwithstanding the plea that it “was a mere parody or burlesque of the original, and was so intended.” In the *Bloom & Hamlin* case there was no infringement because of the unsubstantiality of the copyrighted material used; but, more importantly, the court expressly recognized the fact that parody or burlesque, if it went far enough, would infringe. *Story v. Holcombe* was not a parody or burlesque situation. It was an abridgment case, decided at a time when the Copyright Act permitted bona fide abridgments or condensations. Even so, the decision was that the copyright had been infringed because the copying had gone too far—had, in other words, crossed over into the field of substantiality. With decisions such as these as his authority Weil cannot properly be said to argue that “fair use” has no relation to substantiality of taking. Furthermore, in another portion of his text [*op. cit.*, p. 418, sec. 1097] he recognizes the correct rule and cites the appropriate decisions, *i.e.*, *Green v. Minzenheimer*, *supra*, 177 Fed. 286, *Green v. Luby*, *supra*, 177 Fed. 287, and *Bloom & Hamlin v. Nixon*, *supra*, 125 Fed. 977.

De Wolf’s dogmatic statement that parody is not an infringement [App. Op. Br. 42] is not supported by the citation on his part of any cases. It certainly cannot be given preference over the judicial pronouncements on the subject to which we have referred, which have held that specific parodies did infringe. [Cases cited, Point II, A, *supra*.]

Spring, *Risks and Rights* [App. Op. Br. 42] is not a legal treatise but a popularization of the subject intended for the lay public. As such it suffers from over-simplification of problems and a generality of statement not uncommon in works of that class. In any event, the author recognizes that the proper point of legal attack on parody or burlesque is in the *extent* of the use which is made of copyrighted material. Lindey's "Plagiarism and Originality" [App. Op. Br. 42] is also a popularization for lay consumption. He too, however, recognizes that parody can infringe and that it does infringe when "it is a transparent cover-up for stealing." [Lindey, *op. cit.*, p. 43.]

The quotation from Judge Yankwich's article in 33 Canadian Bar Review 1130 [App. Op. Br. 42-43] is an argument for an *extension* of "the boundaries of 'fair use'" so as to include parody and burlesque. It thus necessarily recognizes that at present the doctrine of fair use is not broad enough to save all parody or burlesque merely because it is that form of expression. The argument is based on "the primary purpose of promoting the progress of science and arts. . . ." Such an argument would apply with equal if not stronger force in favor of permitting any serious or scholarly writer to make similar inroads upon the protection intended to be given by copyright. Yet admittedly the law gives no such privilege to the serious novelist or dramatist or to the scholarly historian, essayist or treatise-writer. He may not appropriate substantial parts of the copyrighted work. Here, again, we may ask: Why such a preferred position for the parodist and only the parodist?

Furthermore, if the three criteria of fair use expounded by Judge Yankwich are applied to our facts the conclusion reached below is confirmed. There can be no doubt that "the quantity and importance of the portions taken" were

substantial as found below; and that “their relation to the work of which they are a part” was basic, intimate and essential. Without those parts neither the infringed nor the infringing work here would be anything but a jumble of meaningless words or “gags.” [Point I, First, Second, *supra*.] The last of Judge Yankwich’s criteria—“the result of their use upon the demand for copyrighted material” is the very one which this Court, in a fair use case, has described as not being necessary to sustain a charge of infringement. “‘The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.’” [*Leon v. Pacific Tel. & Tel. Co.*, *supra*, 91 F. 2d at 486-487, quoting *Fox Film Corp. v. Doyal*, *supra*, 286 U. S. at 127. See, also, the cases cited, Point I, *Third*, and Point II, B, *First, Second, supra*.] Competition, *i.e.*, the reduction of demand for the original, will prevent a use from being held fair. [See, cases first cited, Point II, B, *First, supra*.] Its absence, however, does not transform a substantial taking into a fair or noninfringing use.

Even if absence of competition were relevant, it is not absent at bar. Loew’s had and has the right to reproduce its copyrighted material in any form. It could reissue “Gas Light”. [R. 56.] So, too, it could adapt the work to a comic or parodied version. It is directly contrary to the plain import of the Copyright Act to say that another can anticipate a reissue or such an adaptation and to that extent satisfy the public demand.¹⁷ More-

¹⁷Appellant Benny’s programs are generally heard and seen by 25,000,000 or more people. [R. 72-73.] It has been produced as a motion picture. [R. ~~64, 67-68~~] It could, therefore, be shown in theaters in direct competition with Loew’s photoplay.

over, as we have already noted, millions of people will stay at home to watch a Jack Benny television program. Necessarily, many of those people might otherwise have gone to a movie theater. What the appellants are seeking—and it is significant that CBS, a large, national television network is one of them—is the right to compete with Loew's for the attention and patronage of the entertainment-minded public by appropriating and using the material acquired and created by Loew's at great cost and effort.¹⁸ What, we may ask, is "fair" about that? [See, *Hill v. Whalen & Martell*, *supra*, 220 Fed. at 360, giving emphasis to the fact that those who saw the alleged parody would be less desirous of seeing the original.¹⁹]

The law school student's essay in the ASCAP Symposium [Cohen, Fair Use in the Law of Copyright, 6 Copyright Law Symposium, 54] is apparently cited [App. Op. Br. 42] for its statement that "parody and mimicry are forms of criticism or comment. . . ." That may be true, but it does not mean that *all* parody or mimicry is or is intended to be criticism or, if it is, that it is necessarily *fair* criticism or comment. If the critic, in *good faith*, reviews and comments upon a literary or dramatic work he is entitled to some reasonable degree of quotation. But if, in the guise of criticism, he is really appropriating another's work as the means of providing

¹⁸Contrast the more than \$275,000.00 expended by Loew's for its dramatic material, with the \$5,000.00 paid appellants' "writers" in connection with the television play. [R. 53, 70.] How much more would appellants have had to expend if they had not had ready to hand the appellee's copyrighted photoplay?

¹⁹Word of mouth advertising is of extreme importance in the entertainment world. Note, in that connection, the phenomenal success of the television program conducted by Dr. Baxter, appellants' expert witness, largely helped by the word of mouth advertising of his viewers. [R. 156-157.]

the framework and substance of his own drama or play, he is infringing. [Cf., *Folsom v. Marsh*, *supra*, 9 Fed. Cas. at 344-345; *Webb v. Powers*, *supra*, 29 Fed. Cas. at 516-517; *Bloom & Hamlin v. Nixon*, *supra*, 125 Fed. at 978; *Hill v. Whalen & Martell*, *supra*, 220 Fed. at 360.]

It cannot be seriously argued on this record that Jack Benny, a comedian, CBS, a television network and competitor of Loew's, and the *American Tobacco Co.*, a cigarette manufacturer, were primarily or even incidentally engaging in dramatic criticism—particularly criticism of a motion picture which had been released nearly *ten years* before and which, at the time of the alleged critique, was not and for several years had not been in release in this country. [R. 54, 56.] Rather, they were engaged, respectively, in practicing the acting or comedian's profession, selling advertising time, and advertising tobacco; and they produced their television play, as was found below, for purposes of profit. [R. 82-84.] For such mundane purposes, they should not be free to take the property of another.

If, on the theory of criticism or comment, the mere fact that the copy pokes fun at the original immunizes the copyist from a charge of infringement regardless of the medium in which the criticism appears, no original work is safe. Any such use of the copy, even though in the same medium as the original, would then be defensible as being merely "criticism" although it was in fact a flagrant steal. Any transformation of a drama into a comedy could thus be justified as being "criticism." But criticism to be a defense must be primarily, if not even solely, criticism *as such*. The critical flavor cannot be merely an incident—probably an unintended incident at that—of the primary purpose of getting material for one's

own dramatic or literary effort designed for public performance or sale in the same general medium as the original.

In this connection it is worth pointing out that, insofar as the material lifted from appellees is concerned, its humorous qualities in appellants' use of it springs solely from the *manner in which it is performed* and its juxtaposition to other material of a slapstick nature. The comedy does not inhere in the material itself, as a reading of appellants' scripts [Exs. 9, 11. Appendices A, B, *infra*] will show. So, if here the lifted parts had been performed in a serious rather than a farcical vein, the infringement would be apparent to all. If the manner of performance, rather than the nature and substance of what has been taken, is to govern infringement—and that is what appellants' contention must come down to—the *reductio ad absurdum* is readily perceivable. One could then pirate another's *entire* copyrighted work, perform it word for word as written, but escape a charge of infringement by burlesquing its rendition, *i.e.*, by playing it with comically exaggerated gestures, intonations and stage business.²⁰ That obviously is not and cannot be the law. There is no difference in principle when the comic element is introduced by adapting the pirated material into humorous form rather than by the manner of performing it. In either case it is the *same material* which is taken and used for the ulterior purposes of the taker.

²⁰Old-fashioned and seriously intended dramas are now frequently made into hilarious comedies by just such a burlesque *performance* of the original script. In the case of such a script still protected by copyright, would the burlesque or satirical manner of performing it defeat a charge of infringement?

III.

Custom, Even if Established Which It Was Not, Cannot Change or Limit the Plain Meaning of the Copyright Act.

The argument that “long-established custom” can be looked at to determine appellees’ rights [App. Op. Br. 47-51] is largely, if not entirely, irrelevant. If the taking of substantial copyrighted material by way of parody is not a violation of the rights conferred by the Copyright Act, there is no need to resort to custom. If it is, custom cannot change or alter the statutory grant. [*United States v. Pine River Logging etc. Co.*, 8 Cir., 89 Fed. 907, 915-916; *United States v. Dodson*, S. D. Cal., 268 Fed. 397, 406-407.]

The two cases just cited also indicate that if statutory meaning is to be affected by custom, it must at least be shown that “it [the alleged custom] was prevalent in all sections where the law was to become operative, and was so far universal in the sections where it prevailed, as to leave no room for doubt that the usage was known to the lawmaker, and that the statute which it serves to modify was enacted with reference thereto. . . .” [*United States v. Pine River Logging etc. Co.*, *supra*, 89 Fed. at 915-916.] The evidence of custom fails by a long distance to come up to that standard.

First: The evidence shows no more than that burlesques and parodies have been written since classical Greek times. [R. 115-116.] It also shows that true parody or burlesque “does not parallel [the original] in the sense that it just recreates the thing in a new tone, but it takes off from it . . . But in no sense parallels the original.” [R. 156.] Thus, whatever may be said for the age or the pervasiveness of the custom, it cannot

be said to be so far reaching as to give to the Copyright Act a meaning which would classify as non-infringing a reproduction which does parallel the original.

Appellants' expert witness, it is true, mentioned a number of parodies and burlesques. It is apparent from his description of them, however, that most of them were parodies of style, ideas and philosophies, not copies or reproductions of the detailed manner of expression, incidents and sequence of events of the original. [See, *e.g.*, R. 116, 118, 120-121, 129, 169-170.] They took no more from the original than anyone may freely take from copyrighted works even today. Furthermore, keeping in mind the rudimentary and narrow rights conferred by earlier copyright statutes it is very likely—at least the contrary is not shown [R. 172-183]—that until modern times an author whose work was copied by way of parody had no redress in law.²¹ In those circumstances existence of a practice of heavy appropriations for purpose of parody would be meaningless under a statute, such as ours, designed to reserve to the copyright owner “any lawful use of his property, whereby he may get a profit out of it . . .” [*King Features Syndicate v. Fleischer*, *supra*, 299 Fed. at 535-536.]

²¹The first English copyright statute—the Statute of 8 Anne, c. 19—gave authors only the right to print, publish and republish their works. The same was true of the first American statute. [1 Stat. 124.] Even the right to dramatize a published work was not granted the author in either country until a much later date. [*Ferris v. Frohman*, 223 U. S. 424, 432-433.]

Be that as it may, the practice did not go unchallenged. It was not universally acquiesced in. Some authors objected. [R. 159-162.] Whether authors generally gave or did not give permission to burlesque their works we do not know.²² [R. 174.] And, as we do know, in this country copyright proprietors have objected to the use of their works in burlesque and have been upheld by the courts. [Cases cited, Point II, A, *supra*.]

In short, then, it cannot be said that there has been a universally accepted and acquiesced in practice of appropriating as much as one desires for purposes of parody. Without a practice of that breadth and universality firmly established when the present Copyright Act was enacted in 1909 there is no basis at all for the contention that the statutory grant of an exclusive right to “copy and vend the copyrighted work . . . and to play or perform it in public for profit, and to exhibit, represent, produce or reproduce it in any manner or by any method whatsoever . . .” [17 U. S. Code, sec. 1(a)(c)] is less broad than its language plainly shows it to be.

Second: The fact that appellant Benny has frequently presented parodies on his radio and television programs means nothing. One man’s practice does not make a universal custom. Even if it did, Benny’s practice certainly came much later than the enactment of the Copyright Act of 1909 under which appellees claim.

²²So far as Benny and Loew’s are concerned, such permission was requested by the former from time to time. [R. 58-59.]

Furthermore, so far as *Loew's* is concerned, the evidence is clear that Benny at various times requested its permission to parody some of its pictures, which permission was granted on condition that Loew's have the right of approving his script. [R. 57-59.] This fact alone justified the District Court in concluding that there was no universal custom of free and unrestricted parody; and that Benny did not think there was.

In other instances, Benny's parodies were of pictures the basic literary material of which was in the public domain. [R. 59.] Benny was, of course, free to use this material in parody. In the very nature of things it was freely available to all.

Actually, there is no showing whatever that any of Benny's parodies, other than the one here involved, ever exceeded permissible limits of appropriation, *i.e.*, that they ever went beyond use of the uncopyrightable elements of the photoplays which he parodied. In this connection, it may be said that Judge Carter's decision in what appellants refer to as the "Eternity" case [App. Op. Br. 31-32] was based on this ground. The parody there, he found, did not take substantial copyrightable material from the plaintiff's photoplay. He expressly re-affirmed his earlier view that burlesque was not a defense *per se*. [*Columbia Pictures Corp. v. National Broadcasting Co.*, S. D. Cal., 137 F. Supp. 348, 350-351, 352-353.] The distinction between that case and the one at bar is purely factual, and that difference accounts for the difference in results. So far as rules of law are concerned the two cases are in complete harmony.

Conclusion.

The judgment appealed from should be affirmed. It rests solidly on the foundation of a finding that substantial copyrighted material was taken. That taking was not fair use because of the substantiality of the material appropriated, the existing competitive relationship of the takers vis-a-vis the copyright owner, and the essential unfairness of permitting one to take the property of another for purposes of personal profit. The taking encroached upon the exclusive rights conferred by appellee's copyright and, therefore, required a conclusion of infringement.

Respectfully submitted,

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APPENDIX "A."

Defendants' Television Play (2d Ed.) With Material
Taken From Plaintiff's Photoplay Deleted.

DON

. . . Yes, ladies and gentlemen, tonight the Lucky
Strike Players will bring you a great psychological drama.
. . . "Autolight" . . . starring Barbara Stanwyck
and Jack Benny. . . .

(MUSIC.)

(AS CURTAIN OPENS, WE DISCOVER THE MAID DUSTING
SOME SMALL ARTICLES ON THE MANTLEPIECE.)

* * * * *

(THE 1ST MAID TURNS AND SEES THE MAID ARRANG-
ING THE TRAY ON THE TABLE.)

(MUSIC OUT.)

* * * * *

MAID

The master said she ordered this for dinner.

1ST MAID

What is it?

MAID

Marinated Salami.

* * * * *

1ST MAID

(LOOKING OFF.)

Sssshh . . . here she comes now. If you need me,
I'll be in the pantry.

(1ST MAID EXITS AND THE MAID BUSIES HERSELF WITH
THE TRAY.)

(BARBARA STANWYCK ENTERS AS MRS. MANNING-
HAM.)

(APPLAUSE.)

BARBARA

Elizabeth . . . Elizabeth, I've changed my mind.
I don't think I'll eat anything.

MAID

Why, Madame, don't you feel well?

* * * * *

MAID

Madame, perhaps if you ate something you would feel better.

BARBARA

Yes, yes, perhaps you're right.

(SHE GOES OVER AND SITS AT TABLE.)

MAID

I know you'll enjoy your supper. It's exactly what your husband said you ordered.

BARBARA

(POINTING TO A DISH ON THE TRAY.)

What's that?

MAID

Marinated Salami.

BARBARA

Marinated Salami?

MAID

Yes, ma'am.

(PICKING UP THE TEA POT.)

Shall I pour the sour cream?

BARBARA

(JUMPING UP.)

No, no, don't pour anything. . . . Where's my husband? Why isn't he here when I need him?

SOUND (OFF) DOOR SLAMS.

Madame, I think the master just came in.

(MUSIC.)

BARBARA

Oh, good, good. Elizabeth, you may go.

(MAID EXITS . . . BARBARA GOES TO COUCH, STANDS WITH BACK TO AUDIENCE . . . JACK ENTERS, DRESSED IN THE PERIOD OF THE DAY, AND STANDS WITH AN OVERLY DIGNIFIED AND LOFTY AIR.)

BARBARA

Oh Charles, Charles, my husband . . . I'm so glad you're home.

(JACK CALMLY TAKES OFF HIS HAT AND PLACES IT AND COAT ON RACK, GOES OVER TO FIREPLACE.)

* * * * *

BARBARA

I had to come out, Charles. It was those headaches again . . . those awful headaches. I've been confined to my room all day . . . breakfast in bed, lunch in bed . . . I couldn't have dinner in bed, it was full of dirty dishes.

(SHE THROWS HERSELF ON THE COUCH.)

* * * * *

(JACK TURNS, PULLS THE BELL CORD, AND LOOSE PLASTER FALLS FROM THE CEILING.)

* * * * *

JACK

(TURNING TO ROCHESTER.)

You may go, Jeeves.

ROCHESTER

Thank you, sir. . . . May I have tomorrow off?

JACK

Tomorrow off? Why?

ROCHESTER

The cricket matches, you know.

JACK

Oh yes, yes.

ROCHESTER

Thanks, boss.

JACK

What?

ROCHESTER

Righto, Governor.

(ROCHESTER EXITS . . . BARBARA TURNS TOWARD JACK.)

* * * * *

BARBARA

Wait, Charles, wait . . . Before you go, kiss me.

JACK

Very well.

(JACK GIVES BARBARA A BIG KISS.)

JACK

How was that, Bella?

BARBARA

One dimension.

(JACK LOOKS AT AUDIENCE, MAD, AND WALKS OFF.)

* * * * *

(BARBARA GOES OVER TO UMBRELLA STAND, TAKES OUT AN UMBRELLA, OPENS IT UP, STEPS BACK TO THE BELL CORD, PULLS IT, AND IS DELUGED BY A DOWNPOUR OF PLASTER.)

BARBARA

Why does he leave me like this? Why? Why?

* * * * *

(WE SEE THE DARK FIGURE OF A MAN ENTER THE ROOM.)

BARBARA

Oh, Charles.

(SHE THROWS HER ARMS AROUND HIM AND KISSES HIM FERVENTLY.)

BARBARA

Don't ever leave me again, Charles.

(KISSES HIM AGAIN.)

Oh Charles, Charles, let me hold you closer.

(KISSES HIM AGAIN.)

Charles . . . Wait a minute . . . who are you?

BOB

If I told you I'm anybody else but Charles, I'd be crazy.

* * * * *

BARBARA

Inspector, how do you know so much about this house?

BOB

I built it.

BARBARA

What?

BOB

If your husband ever asks you where Little Rock is, say Idaho.

BARBARA

I don't know what you're talking about . . . Anyway, Inspector, what are you going to do to my husband?

* * * * *

(BOB GOES TO A CLOSET AT THE OTHER END OF THE WALL, OPENS IT, GOES IN, AND CLOSSES THE DOOR AFTER HIM.)

BARBARA

(TO HERSELF.)

He may have to be in there for a long time. I better give him something to eat.

(SHE PICKS UP PLATE OFF THE TABLE, STEPS OVER TO THE CLOSET DOOR AND KNOCKS.)

Inspector . . . Inspector . . .

(THE OTHER CLOSET DOOR OPENS AND BOB STICKS HIS HEAD OUT.)

BOB

Did you call me?

BARBARA

Yes, I—

(TURNING.)

Wait a minute, you were in this closet.

(SHE GOES OVER TO BOB'S CLOSET.)

* * * * *

BARBARA

Thank goodness. Here, in case you get hungry.

BOB

(POINTING TO TRAY.)

What is that?

BARBARA

Marinated Salami.

BOB

Oh, jolly good!

(SOUND: OFF STAGE WE HEAR THE DOOR OPENING AND CLOSING.)

BARBARA

My husband—he's coming back!

(SHE SLAMS THE CLOSET DOOR AND GOES TO SIT DOWN.)

(JACK ENTERS.)

JACK

(POINTING TO FLOOR.)

Bella, how can you be so careless as to leave this napkin on the floor?

BARBARA

I'll put it in the closet.

JACK

No, I'll do it. I'll put it in the closet.

(HE PICKS UP NAPKIN AND STARTS FOR THE CLOSET WHERE WE LAST SAW BOB AND IS ABOUT TO OPEN THE DOOR.)

BARBARA

No, no, Charles, not that closet.

JACK

Huh?

BARBARA

(POINTING TO OTHER CLOSET.)

That is the linen closet.

JACK

Very well. Oh, incidentally, Bella, I ran into Dr. Pepper today and while we were having a coke, he said—

(JACK GOES TO THE OTHER CLOSET, BOB OPENS DOOR, UNCEREMONIOUSLY SNATCHES THE NAPKIN OUT OF JACK'S HAND AND SLAMS THE DOOR SHUT. JACK STANDS LOOKING AT THE DOOR SLIGHTLY BEWILDERED.)

BARBARA

Charles, did you put the napkin in the closet?

JACK

I didn't have to, the closet reached out and grabbed it.

* * * * *

(JACK REACHES FOR THE BELL CORD AND AS HE IS ABOUT TO PULL IT, HE SUDDENLY STOPS . . . STEPS OVER TO THE ARCHWAY AND CALLS—)

Jeeves!

BARBARA

Coward.

JACK

Jeeves, pack madame's bag! But before you do, bring me a brandy.

ROCHESTER

(OFF)

Yes, sir!

* * * * *

(THE BUTLER ENTERS WALKING ON HIS HANDS AND BALANCING A TRAY ON HIS FEET . . . JACK CALMLY REACHES FOR THE BRANDY GLASS ON THE TRAY. HE PICKS UP THE GLASS, GULPS DOWN THE DRINK, REPLACES IT ON THE TRAY, AND THE BUTLER EXITS ON HIS HANDS.)

* * * * *

BARBARA

Fingerprints?

BOB

Yes.

BARBARA

The ones on the rug belong to the butler.

BOB

(To JACK.)

Come along now.

* * * * *

(SHE GOES TO THE BELL ROPE AND PULLS IT . . . BOB COMES IN AS PLASTER AND BRICKS FALL FROM THE CEILING ALL OVER EVERYTHING.)

(MUSIC AND APPLAUSE.)

APPENDIX "B."

Defendants' Television Play (2d Ed.) With Material Supplied by Them Deleted.

. . . we're going to do the play I was talking about.
Barbara Stanwyck and I will present a satire of M.G.M.'s
great classic, "Gaslight." . . .

* * * * *

DON

The scene is the living room on the first floor of a four-story house in a gloomy and unfashionable quarter of London in the year 1871.

(A MAID ENTERS WITH A TRAY AND PLACES IT ON
THE TABLE.)

DON

Outwardly the atmosphere is one of peace, for even the servants are unaware that for the past weeks the master of the house has been systematically pursuing a sinister, diabolical scheme to drive his wife insane.

* * * * *

1ST MAID

I thought the master wanted Mrs. Manningham to have supper in her room.

MAID

(SLIGHT ENGLISH ACCENT.)

He did, but she insists on eating in here . . . and if you ask me, I think she's off her trolley.

* * * * *

1ST MAID

She's an odd one, all right.

MAID

The master says if she gets any worse, he's going to send her away to a—

* * * * *

BARBARA

It is these headaches, the frightful headaches . . .
and my husband tells me I keep doing things I don't
even remember. I can't sleep at night . . .

* * * * *

I'm going mad, I tell you . . . These headaches,
these awful headaches, I don't even remember ordering
anything like that . . .

* * * * *

(JACK ENTERS, DRESSED IN THE PERIOD OF THE DAY,
AND STANDS WITH AN OVERLY DIGNIFIED AND LOFTY AIR.)

* * * * *

BARBARA

The hours that you're away drag on and on. I can't
live without you by my side. I need your sympathy . . .
your help . . . your tender understanding.

(JACK, WITH MEASURED NONCHALANCE, REMOVES HIS
GLOVES, FINGER BY FINGER.)

BARBARA

Oh, my darling . . . my beloved . . . only you
can guide me through the darkness of my confusion.
Only you can make me smile again, laugh again, live
again . . . Charles . . . Charles . . . speak
to me . . . speak to me!

JACK

(WITH ARROGANT COLDNESS.)

What are you doing out of your room?

(TURNING.)

Answer me, Bella . . . What are you doing out
of your room?

BARBARA

I had to come out, Charles. It was those headaches again . . . Those awful headaches . . . it was driving me mad . . .

* * * * *

(SHE THROWS HERSELF ON THE COUCH.)

JACK

Now, now, Bella, control yourself. Now now, you're getting hysterical . . . What you need is a sedative. I'll ring for the maid.

* * * * *

JACK

* * * * *

Bella, while you're waiting for a sedative, why don't you just relax?

BARBARA

Yes, Charles.

JACK

Now just close your eyes and forget everything.

BARBARA

Yes, Charles.

(JACK RUSHES OVER AND TURNS A PICTURE OF WASHINGTON CROSSING THE DELAWARE UPSIDE DOWN . . . THEN GOES BACK TO LEFT OF BARBARA.)

JACK

Do you feel better now, Bella?

BARBARA

(OPENING HER EYES.)

Yes, Charles, yes.

JACK

(LOOKING AT PICTURE.)

I knew if you just sat down for a minute and relaxed,
you'd feel so much . . . so much . . .

BARBARA

Charles . . . what are you staring at?

JACK

That picture . . . that picture on the wall. Why
did you turn it upside down?

BARBARA

Picture . . . upside . . .

(TURNS, LOOKS AT PICTURE . . . THEN BACK TO
JACK.)

But I didn't . . . I didn't turn that picture upside
down. It must have been someone else.

(BURIES FACE IN HANDS, CRYING.)

Oh, Charles, what's happening to me . . . what's
happening to me?

* * * * *

JACK

Bella . . . the other picture is upside down, too.
Look!

BARBARA

No! No!

JACK

Why do you keep doing these things?

BARBARA

But I didn't! I didn't.

JACK

(BENDING OVER BARBARA.)

Bella, Bella, your mind is failing. Why don't you let me send you away? You turned the picture upside down and don't even remember.

BARBARA

(GETTING UP.)

But I didn't do it, Charles. . . . It must have been someone else.

(GOES TO FIREPLACE.)

JACK

Someone else . . . always someone else. Bella, are you suggesting that one of the maids or the butler did it?

BARBARA

(GROPING.)

Yes, yes. . . . That's it, the butler, he must have done it.

JACK

Very well, I'll find out.

(JACK STARTS FOR THE BELL CORD . . . BARBARA TAKES A STEP TOWARD JACK.)

BARBARA

Charles, don't humiliate me in front of the servants, please.

(SITS DOWN ON COUCH.)

JACK

It's the only way, Bella. I must ring for the butler.

BARBARA

Oh, Charles, if the butler didn't turn the pictures upside down, perhaps I did it, but I don't remember.

* * * * *

JACK

Hmm . . . what's keeping that butler?

(CALLING.)

Jeeves . . . Jeeves.

(ROCHESTER ENTERS.)

ROCHESTER

Cheerio. Did you ring, sir?

JACK

Yes, Jeeves. . . . The pictures on the wall are upside down if you noticed it.

(POINTING TO PICTURES.)

ROCHESTER

(LOOKING AT PICTURES.)

Well, by Jove, if they ain't!

JACK

Did you do it?

ROCHESTER

Who, me?

BARBARA

Yes, Jeeves, maybe you turned them upside down when you were dusting.

* * * * *

ROCHESTER

Oh, your lordship, come now!

JACK

Then I can assume that you did not turn the pictures upside down.

* * * * *

(TURNING TO BARBARA.)

Did you hear that, Bella? It was you who did it.

BARBARA

But, Charles, I don't remember, I don't remember.

JACK

Don't remember . . . don't remember . . .
You've been doing everything backwards . . .

* * * * *

Bella, you're all mixed up. . . . Why don't you
admit it . . .? Why don't you let me take care of
you? Why don't you let me take care of you?

* * * * *

Bella, your mind is failing and you might as well
admit it.

(TURNING TO ROCHESTER.)

You may go, Jeeves.

* * * * *

(ROCHESTER EXITS . . . BARBARA TURNS TOWARD
JACK.)

JACK

Bella, I'm sure that now you realize you are mentally
ill.

(JACK TURNS AND PICKS UP HIS HAT, CAPE, CANE,
ETC.)

BARBARA

(GOING TO STAIRWAY.)

Charles . . . Charles . . . where are you going?

JACK

I have an appointment.

BARBARA

Every night . . . every night you leave me
alone . . .

* * * * *

(JACK LOOKS AT AUDIENCE, MAD, AND WALKS OFF.)

BARBARA

(STARTS AFTER JACK, STOPS, TURNS BACK.)

Every night he leaves me alone. I can't stand it any longer.

These headaches, these awful headaches. I must have someone to talk to.

(CALLS.)

Elizabeth . . . Elizabeth . . . Where is that maid?

(THE LIGHTS FLICKER AND GO DIM.)

BARBARA

The lights . . . the gas lights are going dim again . . . the same as they did last night and the night before. Every time he leaves me, they go dim. Oh, why does he do this to me? If only he knew how much I love him, he'd stay here and comfort me through my hours of—

(SOUND: DOOR OPEN AND CLOSE OFF SCENE.)

BARBARA

The front door. . . . He's come back. He's come back!

(WE SEE THE DARK FIGURE OF A MAN ENTER THE ROOM.)

* * * * *

BARBARA

(STEPPING BACK.)

What do you want?

BOB

I want to see you. I'm an inspector from Scotland Yard. I've come to talk to you about your husband.

BARBARA

Oh, my poor Charles . . . is he in danger?

BOB

No, but you are.

BARBARA

Me?

BOB

Yes. . . . You see, your husband is a notorious jewel thief. Fifteen years ago he murdered a woman who lived in this mansion. Then he married you so that under the guise of an English gentleman he could buy the place and search for her hidden jewels.

BARBARA

No, Inspector!

* * * * *

BOB

Now as I was saying . . . Your husband is trying to drive you out of your mind so that he can send you away and then he can continue his search in the attic.

BARBARA

(GETTING UP.)

That's why the lights go dim down here. He turns the gas on in the attic.

BOB

Yes . . . then he has a secret door through which he can return to the living room and act as though nothing has happened.

* * * * *

(THE LIGHTS NOW FLICKER AND GET BRIGHT AGAIN.)

(MUSIC.)

BARBARA

The lights . . . the gas lights are up again. That means my husband is coming back. . . . Quick, quick . . . get in the closet.

(BARBARA GOES TO TABLE.)

(BOB GOES TO A CLOSET AT THE OTHER END OF THE WALL, OPENS IT, GOES IN, AND CLOSSES THE DOOR AFTER HIM.)

* * * * *

JACK

Well, Bella, are you feeling better now?

BARBARA

Yes, Charles, my headache is all gone.

JACK

Oh.

* * * * *

BARBARA

(WITH BACK TO JACK.)

Charles, you're talking crazy.

JACK

No, no, Bella, you're the one who's crazy. You keep going around the house turning things upside down . . . and then you say you don't remember.

(TURNS BARBARA AROUND.)

Admit it yourself, Bella, you're losing your mind. Let me send you away. I'll have the butler pack your bag.

* * * * *

ROCHESTER

(OFF)

Yes, sir!

JACK

(HE GOES BACK TO BARBARA.)

I must send you away, Bella. This evening you turned the pictures upside down. Yesterday you turned the chair upside down, the desk upside down, the table upside down, you kept going all around the house turning everything upside down.

* * * * *

JACK

(WITH VILLAINOUS EXPECTANCY.)

Bella . . . Bella . . . didn't you notice anything different about the butler?

BARBARA

Yes, Charles, and I found out something different about you, too.

JACK

What?

BARBARA

Your game is up . . . Your scheme didn't work . . . I know who you are . . . and what you are . . . and I know what you've been trying to do to me.

JACK

Oh, you do, eh? . . . then my dear Bella, the time is over for subtleties.

(JACK MAKES A LUNGE FOR BARBARA, FASTENS HIS FINGERS ABOUT HER THROAT AND BENDS HER OVER A CHAIR. THE CLOSET DOOR OPENS AND BOB STEPS INTO THE ROOM . . .)

BARBARA

Inspector, help me . . . please!

BOB

What? . . . Oh, yes, yes.

(HE TOSSES THE PLATE ASIDE AND QUICKLY SUBDUES JACK.)

Unhand that woman. Mr. Manningham, I place you under arrest. Lady Bella, I shall take him to the police station and then I'll come back and search the house for fingerprints.

* * * * *

BARBARA

(GETTING UP.)

Wait, before you take him away, I'd like to talk to my husband alone.

(TURNS BACK TO JACK.)

BOB

Alone. Then I better tie him to this chair.

(BOB SETS JACK IN THE CHAIR AND TIES HIS HANDS BEHIND HIM WITH THE NAPKIN.)

BOB

(TO BARBARA.)

I'll be in the kitchen, if you need me.

(BOB EXITS.)

JACK

That was very clever of you, Bella, the way he fell for it.

BARBARA

What?

JACK

I'm Charles, your husband, and you love me . . . do you hear, you love me. Go, Bella, go over to that table. There's a knife there. Get it and cut me loose.

BARBARA

(CRAZILY.)

Yes, yes, the knife . . . the knife.

(SHE GOES TO THE DESK, GETS THE KNIFE, STEPS BACK TO JACK, AND STANDS LOOKING AT HIM DELIBERATING.)

JACK

That's it, Bella . . . Bella, why are you standing there? . . . Cut me loose . . . Cut me loose . . . Bella, aren't you going to cut me loose?

BARBARA

(VERY DRAMATIC AND MENACING.)

Yes, Charles, I'm going to cut you *very* loose.

JACK

Bella! Bella . . . Bella . . . what are you going to do? . . . I'm your husband. I'm Charles.

BARBARA

(KNEELING BY JACK.)

Yes, Charles, you're my husband . . . and you tried to make me believe that I was crazy. . . . Well, maybe I am.

(PUTTING THE KNIFE TO HIS THROAT.)

Maybe I am . . . But it was you who drove me to it . . . It was you who turned the pictures upside down . . . It was you who turned the lamp upside down and almost convinced me that I did it . . . Then you turned the table upside down . . . the desk upside down . . .

* * * * *

JACK

Bella!

* * * * *

JACK

Bella, don't kill me . . . don't kill me!

BARBARA

No, I won't kill you. That's too good for you. I'm
going to let them take you away . . . INSPECTOR,

* * * * *

. . . INSPECTOR . . .

(MUSIC AND APPLAUSE.)

No. 14928.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BENNY,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN
TOBACCO COMPANY,

Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

Appeals From the United States District Court for the Southern
District of California, Central Division.

APPELLANTS' REPLY BRIEF.

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FILE

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TOPICAL INDEX

PAGE

I.

Appellees' claim that a parodist has no right of fair use is without merit	1
--	---

II.

Appellees' claim that the continued exercise of the parodist's right of fair use constitutes an attempt to change the law is without merit	9
--	---

III.

"Autolight" is an acknowledged legitimate parody or burlesque, and therefore does not infringe "Gaslight"	10
---	----

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Cain v. Universal Pictures Co., 47 F. Supp. 1013.....	12
Cary v. Kearsley (1802), 170 Eng. Rep. 679.....	3
Chamberlin v. Uris Sales Corp., 150 F. 2d 512.....	9
Christie v. Harris, 47 F. Supp. 39, aff'd 154 F. 2d 827, cert. den. 329 U. S. 734.....	12
Fox Film v. Doyal, 286 U. S. 123.....	3
Frankel v. Irwin, 34 F. 2d 142.....	12
Hill v. Whalen, 220 Fed. 359.....	5
Martinetti v. Maguire, 16 Fed. Cas. 920.....	9
Nichols v. Universal Pictures Corp., 45 F. 2d 119.....	12
Soy Food Mills v. Pillsbury Mills, 161 F. 2d 22, cert. den. 332 U. S. 766.....	11
United States v. Paramount Pictures Corp., 334 U. S. 131.....	3

STATUTE

United States Constitution, Art. I, Sec. 8.....	3, 9
---	------

TEXTBOOKS

33 Canadian Bar Review (1955), pp. 1130, 1132, Yankwich, Parody and Burlesque in the Law of Copyright.....	3, 7
33 Canadian Bar Review pp. 1152-1153, Yankwich, Parody and Burlesque in the Law of Copyright.....	7
Shaw, Literary Property in the United States, p. 67.....	3
Spring, Risks and Rights, p. 180.....	5
22 University of Chicago Law Review (1954), p. 203, Yank- wich, What Is Fair Use?.....	3

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APPELLANTS' REPLY BRIEF.

I.

Appellees' Claim That a Parodist Has No Right of Fair Use Is Without Merit.

Throughout their brief, appellees reiterate in varying forms the question: "Why should the parodist, and only the parodist, stand in any better or different position before the law" than the serious dramatist or novelist whose use of copyrighted material would constitute infringement. (Appellees' Br. pp. 2, 3, 4, 34.) They argue that whenever one author has in any way used in his work more than an insubstantial proportion of the protectible mate-

rial contained in the work of another, there is actionable infringement wholly regardless of the purpose of such use, the manner in which the use is made, the necessity for the use in order to create a resultant new and totally different art form, or the extent to which the public interest would be injured were the use prohibited. The sole test, according to appellees, is whether the *amount* used would be considered "substantial" in the ordinary plagiarism case. Their position is clearly stated in their own words as follows:

"Appellants have taken from the photoplay, not alone the general theme or idea, but the major sequences and details. . . . The parts so taken were substantial. . . . These principles make inescapable the conclusion that appellee's copyright was infringed by appellants. . . . The test of infringement *must in every case be the substantiality of the material taken*, not the mode or form in which the appropriations are used. . . . In other words, a parodized or burlesqued taking is treated no differently than any other appropriation." (Appellees' Br. pp. 8-15.)

And appellees flatly assert that the doctrine of fair use is not applicable to this case. (Appellees' Br. p. 15.)

The fact is, however, that the parodist does stand on a different footing from the serious dramatist or novelist. The unique requirements of the parodist's art confer on him the right to make a fair use of copyrighted material, and the interest of the general public in preserving this art form confers on it the right that such fair use be permitted. The failure to recognize these rights is the fundamental defect not only of appellees' brief but of the opinion below.

The doctrine of fair use is based squarely upon the constitutional mandate contained in Article I, Section 8, as uniformly construed by the courts. The copyright monopoly is granted solely to “promote the Progress of Science and the useful Arts,” and “The primary object in conferring the monopoly lies in the general benefits derived by the public from the labors of authors.” (*Fox Film v. Doyal*, 286 U. S. 123, 127.)* The doctrine of fair use exists as an integral part of the copyright law, because the public interest may demand, or even require, that certain uses be made of copyright materials, in which case the constitutional mandate would prevent the prohibition of such uses.**

Congress has not granted to authors the right to be free of “fair use” of their works; that is not one of the rights included in the copyright monopoly. When the statute grants a copyright to an author, it equivalently grants to the public at large the right to make such uses of that work as the public interest requires. As said by Ralph Shaw in his work, “Literary Property in the United States”:

“The differentiation between fair use and infringement is fundamentally a problem of balancing what the author must dedicate to society in return for his

*Quoted in *United States v. Paramount Pictures Corp.*, 334 U. S. 131, 158, where the court says: “The copyright law, like the patent statutes makes reward to the owner a secondary consideration.”

**Yankwich, “What is Fair Use?”, 22 Univ. of Chicago L. Rev. 203 (1954); “Parody and Burlesque in the Law of Copyright”, 33 Canadian Bar Rev. 1130, 1132 (1955). As Lord Ellenborough said in *Cary v. Kearsley*, 170 Eng. Rep. 679 (1802): “That part of the work of one author is found in another, is not of itself piracy or sufficient to support an action; a man may fairly adopt part of the work of another; *he may so make use of another’s labours for the promotion of science and the benefit of the public.*”

statutory copyright—which varies according to the nature of the works involved—against undue appropriation of what society has promised the author in terms of protection of his exclusive right to make merchandise of the product of his intellectual work. In its simplest terms, . . . fair use is all use dedicated to the public by the nature of statutory copyright. . . .” (P. 67.)

Because the basic tests of the extent to which use can be made of copyrighted material are founded upon the public interest, they must vary in relation to the varying factors which affect that interest. It follows that no artificial measurement of “substantiality” in the ordinary plagiarism sense can be applied as contended by appellees.

In the first place, their assertion that *any* “substantial” use is *ipso facto* an unfair use (Appellees’ Br. pp. 18, 22) leaves no room for the doctrine at all. If the material used is in the public domain or is “insubstantial,” then there is no limitation whatever upon its use by others and fair use is not involved. (Appellants’ Br. p. 21, footnote.) The doctrine is only applicable where there has been a use of protectible material which would be substantial and an infringement except for the particular purpose or manner of use.

But, aside from that, the quantitative or qualitative measure of what is used is only *one* factor to be taken into consideration in weighing the primary demands of the public interest against the secondary object of protection to the author. In some instances the use of a comparatively minor though “substantial” part of the protectible material may be an infringement; in others, a very extensive use of such material will be fair. The difference in the result is not determined by either the amount

or the nature of the material taken; it is dependent upon the extent of the public interest in protecting or fostering the particular use which is made of that material.

Literary criticism is a case in point. For the purpose of criticism or review an author may give a full description of a copyrighted work, including its detailed story line or sequence of incidents, and make copious quotations therefrom. (Appellants' Br. pp. 24-25.) He may do so even though the criticism is wholly adverse, and thus one for which no consent could be "implied."* (*Hill v. Whalen*, 220 Fed. 359 (S. D. N. Y., 1914).) The reason for this extensive right of use is that literary criticism is an established art form which in the public interest ought to be protected and encouraged, and by the very nature of the form a critic ordinarily cannot perform his function in the way it ought to be performed without such use. Consequently, the law permits that use so long as it is within the limits of what is reasonably necessary to permit the critic to create his particular independent work.

*A moment's reflection will dispel the appellees' notion (Appellees' Br. p. 18) that fair use is dependent upon the consent of the author or copyright proprietor. If that were so, then any author could prevent or limit any quotation or other use of his work for purposes of exemplification, criticism, review or otherwise, by a simple "notice of non-consent". But as Mr. Spring says in his book "Risks and Rights":

"No copyright proprietor can destroy that right, or limit it *e.g.*, to a newspaper or periodical. Other book writers have the right of fair comment and criticism upon the ideas or literary merits of a copyrighted work, also the right to copy extracts thereof to buttress and illustrate or to corroborate that comment. And the use of quotations, to create background atmosphere or illustrate points, is a right of fair use that cannot be withheld by any copyright proprietor or publisher. . . . All the cases indicate that the definition of fair use and fair comment is for the court, *acting in the public's interest*, not for the publisher as the copyright proprietor." (P. 180.)

The same is true of the art form of parody and burlesque of particular works. Like literary criticism (and unlike any other art form of which we are aware) it is of its essential nature that it *must* make some use of a specific book, play, picture or other work of art.* Literary history shows that the more pointed and specific are the references to the "original," the more effective is the parody and the closer it approaches to the heights of great independent artistic creations. If, as we believe, the public interest is best served by the preservation of this ancient art form, the parodist must be allowed such use as will accomplish such preservation. Consequently, the test of infringement in this case cannot depend upon the establishment of any fine line between "substantiality" and "insubstantiality," in the plagiarism sense, or upon a strict qualitative or quantitative measurement of what is used. Rather, it must depend upon what is done with what is used—whether, on the one hand, the material is used only as the necessary ingredient for the independent creation of a bona fide parody or burlesque possessing the new and totally different literary characteristics of that

*We have never contended, as appellees would have this court believe (Appellees' Br. pp. 36-38), that parody is entitled to use prior works because it is a branch of the art form of literary criticism. It is undeniable that most parodies are by their nature critiques of the works parodied as we pointed out (Appellants' Br. p. 14), but the two art forms are separate and distinct. However, there is a vital point of similarity in that both must make substantial use of prior works to live and flourish. Appellees apparently concede (though grudgingly) that right to criticism; parody is entitled to the same right for the same reason.

art form, or whether it is taken *animus furandi* for the purpose of reproducing the basic literary values of the original and thereby replacing that original before the public. As Judge Yankwich puts it:

“The controlling question should be, not whether the parody or burlesque contains the skeleton or outline of the play or story it criticizes or ridicules, but whether it is true parody or a mere subterfuge for appropriating another person’s intellectual creation. ‘Fair use’ thus becomes determinable in the light of all the valid judicially established criteria, including the result to be achieved, and in consonance with literary reality. For parody, under accepted definitions, is a type of composition which (1) seeks, in good faith, to criticize, caricature, mock, ridicule and distort the intellectual product of another, and (2) not to imitate or reproduce it as written, and (3) which, despite its own originality or merit, lacks the artistic and literary quality of the original. And, if a particular parody or burlesque achieves this, the fact that it is executed within the frame or around the outline of a serious work—the fact that there is (as there must be in any parody or burlesque) casual imitation—should not deprive it of standing as an independent literary or artistic creation in our courts. . . .” (Yankwich, “Parody and Burlesque in the Law of Copyright,” 33 Canadian Bar Review 1130, 1152-1153.)

The fundamental difference between the art forms of the serious novelist and dramatist and the art form of the parodist which gives to the latter the right of fair use ordinarily denied to the former, lies in the fact that the art form of the parodist of the particular absolutely

requires the use of some other specific work of literature or art as its subject. Unless adequate use of that subject is made, there cannot be a parody of this type. Great novels or plays can be written without the slightest use of any other work; no parody of the particular can be. In the one case, public interest can be fully served by giving the copyright owner broad monopoly rights; in the case of parodies and of literary criticism, such interest can only be served by narrowing the monopoly scope sufficiently to permit the uses which are necessary to the existence of those useful arts.

Of course, the extent of the use is entitled to full consideration as one factor in determining the legitimacy of the result. There is bound to be a point at which the amount taken may be so great that the claim of burlesque or parody would become a subterfuge to disguise the reproduction of the substantial literary values of the original, untransmuted by creative literary effort. No public interest warrants such protection. But until such point is reached, we submit the parodist ought to have freedom to select those facets of the original which he desires to recall to his audience as the basis for exercising his own talent in this unique art form. The legitimate interests of authors and public alike will be irreparably harmed by the imposition of the strait jacket which appellees demand.

II.

Appellees' Claim That the Continued Exercise of the Parodist's Right of Fair Use Constitutes an Attempt to Change the Law Is Without Merit.

We believe this court will agree with the trial judge that this case is one of first impression.* It is not controlled by any breadth of general language in the Act, for such language is uniformly interpreted in the light of the constitutional purpose. (*Chamberlin v. Uris Sales Corp.*, 150 F. 2d 512 (2d Cir., 1945); *Martinetti v. Maguire*, 16 Fed. Cas. 920 (Cir. Ct. Cal., 1867).) The doctrine of fair use itself is not to be found in the language of the Act. It has been judicially declared as a necessary limitation of the copyright monopoly under the mandate of Article I, Section 8, of the Constitution.

Appellees argue (Resp. Br. 39) that custom cannot change the law. They thus industriously buffet a straw man. The issue is one of *interpreting* the law in the light of its necessary purpose "to promote Science and the useful Arts." The fact that both before and after the passage of this Act, and each Amendment thereto, the art of parody has continuously existed and flourished without challenge is potent evidence of the public interest in its

*No purpose is to be served by further extended discussion of the English and American authorities analyzed at pages 35 to 43 of our opening brief. Appellees present no new cases. As we pointed out (Appellants' Br. pp. 40-41) the "mimicry" cases discussed by appellees (Appellees' Br. pp. 15-17) involved no literary parody or burlesque. The copyrighted work was there performed without change. They do illustrate, however, the extent to which courts have gone in permitting the use of "substantial" material even under such circumstances.

preservation. Examination of the examples and sources given in our opening brief at pages 14 to 21 will show the extensive use of otherwise protectible property in their creation.

None of the statutory revisions since 1790 purports to destroy or limit the legitimate right of parody. On the other hand, our courts have seldom, if ever, interpreted the Act to expand the copyright monopoly and to take away rights currently enjoyed by the public except when such a result was clearly intended. As appellees admit (Appellees' Br. p. 2), limitations on public rights to use literary material have resulted only from changes in the statute itself. In this case, as in those others, it is primarily for Congress to determine whether any such limitation is in the public interest.

III.

"Autolight" Is an Acknowledged Legitimate Parody or Burlesque, and Therefore Does Not Infringe "Gaslight."

The proper test of infringement in this case is, as we have shown, to determine whether the work in question used appellees' material only as the necessary ingredient for the independent creation of a bona fide parody or burlesque possessing the new and totally different literary characteristics of that art form, or whether such material was used *animus furandi* for the purpose of reproducing the basic literary values of the original and thereby replacing the original before the public. Since the court below erroneously failed to apply this test, its findings of

fact as to copying (Appellees' Br. p. 1) are not pertinent to the issue actually involved. Moreover, where, as here, the facts are not in dispute and the works involved are available for examination by the Court of Appeals, the findings below do not have the conclusive effect asserted (pp. 1, 8) by appellees. *Soy Food Mills v. Pillsbury Mills*, 161 F. 2d 22, 25 (7th Cir., 1947); cert. denied 332 U. S. 766 (1947).

There can be no doubt but that "Autolight" is a bona fide and legitimate parody or burlesque. Appellees made no attempt to prove that "Autolight" is a subterfuge. Indeed they apparently do not challenge its legitimacy.

As pointed out in our opening brief (pp. 43-46), "Autolight" was a new and independent literary work. Every element of "Gaslight" used in "Autolight" was changed, inverted and transformed into a diametrically opposite set of literary values. Everything that was serious, tense and dramatic in the original became hilarious in the burlesque. The leading characters were mocked in an exaggerated and ludicrous fashion. This is the essence of parody and burlesque.

In burlesquing "Gaslight," the authors of "Autolight" necessarily had to use recognizable elements of "Gaslight," for otherwise the burlesque had no point. They chose to use the basic plot and the outline of a few key incidents on which to focus their talents in this different field. But their use was no greater than was reasonably necessary to accomplish their proper purpose, and the few bare bones they used, they clothed with their own entirely

different literary treatment, expression and development. The resulting burlesque in no way supersedes or substitutes for the motion picture. It is, in short, only a fair use of the copyrighted material in "Gaslight."

The way to determine whether the television program "Autolight" is merely a depiction of the basic literary values of the motion picture "Gaslight," is to view each production as it appeared to its respective audience. Since both works are to be made available to the court for examination in that form, there is no necessity to comment at length on the distorted impression which may be conveyed by the appendices to appellees' brief. It is sufficient to point out that those appendices, bearing no real resemblance to the motion picture or television program, are typical of the kind of "analysis" by lineal dissection and rearrangement which has been uniformly condemned by the courts. (*Nichols v. Universal Pictures Corp.*, 45 F. 2d 119 (2d Cir., 1930); *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013 (S. D. Cal., 1942); *Frankel v. Irwin*, 34 F. 2d 142, 144 (S. D. N. Y., 1918); and *Christie v. Harris*, 47 F. Supp. 39 (S. D. N. Y., 1942), aff'd 154 F. 2d 827 (2d Cir., 1946), cert. denied 329 U. S. 734 (1946).)

We think that consideration of the works as publicly presented will make it clear beyond doubt that "Autolight" and "Gaslight" are separate and independent creations, each having its own literary merit. "Gaslight" is a fine motion picture. "Autolight" is a bona fide parody, just as much as were the parodies of Fielding, Thackeray,

Burnand, Harte, Weber and Fields, and scores of others in the earlier days, and of Pain, Benchley, Thurber, Corey Ford, and the other great modern exponents of the art. If "Autolight" has no independent right to existence, then neither have the parodies of those famous and respected authors, and from this date a great literary tradition must vanish. We submit that American copyright law does not require that result.

Respectfully submitted,

O'MELVENY & MYERS,

HOMER I. MITCHELL,

W. B. CARMAN,

WARREN M. CHRISTOPHER,

*Attorneys for Appellants Columbia Broad-
casting System, Inc., and American
Tobacco Company,*

WRIGHT, WRIGHT, GREEN & WRIGHT,

LOYD WRIGHT,

RICHARD M. GOLDWATER,

Attorneys for Appellant Jack Benny.

May, 1956.

No. 14929

**United States
Court of Appeals**
for the Ninth Circuit

HAROLD G. BAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

No. 14929

**United States
Court of Appeals**
for the Ninth Circuit

HAROLD G. BAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

NAMES AND ADDRESSES OF COUNSEL

GERALD D. HILE, ESQ.,
4506 California Ave.,
Seattle 16, Washington,
Attorney for Appellant.

CHARLES P. MORIARTY, and
WILLIAM A. HELSELL,
1012 U. S. Court House,
5th at Madison,
Seattle 4, Washington,
Attorneys for Appellee.

United States District Court, Western District of
Washington, Northern Division

No. 49163

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAROLD G. BAUER,

Defendant.

INDICTMENT

The Grand Jury charges:

Count I

That on or about the 12th day of February, 1954, at Seattle, within the Northern Division of the Western District of Washington, the defendant, Harold G. Bauer, then and there not being a person permitted to hold in his possession or retain a legal and equitable interest in gold bullion by any regulation issued by the Secretary of the Treasury and approved by the President of the United States, did then and there wilfully, unlawfully and knowingly hold in his possession and retain a legal and equitable interest in gold bullion in excess of the value of One Hundred Dollars (\$100.00) and in excess of Thirty-Five (35) fine Troy ounces, to wit, approximately Fifteen (15) crucible-shaped gold ingots of a total gross weight of approximately Three Hundred Thirty-Eight and 90/100 (338.90) ounces, situated in the United States and owned by a person subject to the jurisdiction of the United States, without a

duly issued license authorizing and permitting him to so hold in his possession and retain a legal and equitable interest in said gold bullion.

All in violation of Title 12, U.S.C., Section 95(a), and Executive Order 6260, as amended.

A True Bill.

/s/ WALLACE L. COUSENS,
Foreman.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ WILLIAM A. HELSELL,
Assistant United States Attorney.

Bail: \$5000.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

WARRANT FOR ARREST OF DEFENDANT
(Rev. 7-52)

To any United States Marshal or any other authorized officer:

You are hereby commanded to arrest Harold G. Bauer and bring him forthwith before the United States District Court for the Western District of Washington, in the city of Seattle, to answer to an Indictment charging him with possession and retaining of legal and equitable interest in gold bullion in

excess of value of \$100.00, etc., in violation of Title 12, USC., Section 95(a), and Executive Order 6260, as amended.

Dated at Seattle, Wash., on March 23, 1955.

MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Deputy Clerk.

Bail fixed at \$5000.00.

Return

Received the within warrant the 23rd day of March, 1955, and executed same by the arrest of Harold Bauer on March 28, 1955.

/s/ WM. LARSON,
United States Marshal.

Received March 23, 1955.

[Endorsed]: Filed March 28, 1955.

[Title of District Court and Cause.]

ARRAIGNMENT AND PLEA

Now on this 28th day of March, 1955, this cause comes on before the Court for arraignment and plea with William A. Helsell acting as attorney for the United States, and Gerald D. Hile attorney for defendant, who is present. Mr. Helsell moves the in-

dictment, heretofore kept secret, now be published and it is so ordered. Defendant has been furnished with a copy of the indictment, understands the nature of the charge, and waives the reading of the indictment. Defendant enters a plea of Not Guilty and Mr. Hile moves for 3 weeks to move against the indictment, which motion is granted. Mr. Hile further moves that the defendant be allowed to remain at large on his Personal Recognizance bond. There being no objections by the Government, it is so granted. Mr. Hile further moves that the defendant be allowed to leave the jurisdiction of this Court for the purpose of his employment, and the Court directs that a minute order be entered so ordering.

[Title of District Court and Cause.]

APPEARANCE

To the Clerk of the Above-Entitled Court:

Please enter my appearance as attorney of record for the defendant in the above-entitled cause.

/s/ GERALD D. HILE,

Attorney of Record for
Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant moves the above-entitled cause be dismissed for the reason that the Indictment of the Grand Jury therein fails to allege facts sufficient to constitute a crime by defendant against the laws of the United States of America.

/s/ GERALD D. HILE,
Attorney of Record for
Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

HEARING

Now on this 16th day of May, 1955, William A. Helsell is present as attorney for plaintiff and Gerald D. Hile is acting as attorney for defendant. The matter comes on before the Court for further hearing on defendant's motion to dismiss. Arguments are heard and the motion is denied. Briefs (from former case) are returned to counsel. Trial date of July 12, 1955, is stricken and the cause is now set for trial on July 26, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

1955

July 26—Ent. Record of Trial by Jury (1st day).
Exhibits.

July 27—Ent. Record of Trial by Jury (2nd day).
Exhibits.

July 28—Ent. Record of Trial by Jury (3rd day).
Exhibits.

Sept. 20—Filed Notice of Appeal in duplicate.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Entitled Cause, Find the Defendant, Harold G. Bauer, is guilty as charged in the Indictment.

/s/ WILLIAM H. GRAHAM,
Foreman.

Dated: July 28th, 1955.

[Endorsed]: Filed July 28, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant, Harold G. Bauer, moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's challenge to the sufficiency of the evidence at the conclusion of the Government's case in chief.

2. The Court erred in denying defendant's motion for acquittal made at the conclusion of all the evidence.

3. The verdict is contrary to the weight of the evidence.

4. The verdict is not supported by substantial evidence.

5. The Court erred in sustaining objections to questions addressed to the witness, William B. Cline, concerning the Gold Reserve Act.

6. The Court erred in sustaining the objection to the admission in evidence of a copy of the Treasury Gold Regulations.

7. The Court erred in sustaining the objection to the question addressed to the witness, Richard Kauffman, concerning the defendant's criminal record.

8. The Court erred in charging the jury and in refusing to charge the jury as requested.

9. The Court erred in instructing the jury as to the essential elements of the offense, which the Government was required to prove.

10. The Court erred in refusing to permit counsel for the defendant to argue to the jury the Government's failure to prove all the allegations contained in the indictment.

11. The defendant was substantially prejudiced and deprived of a fair trial by reason of the fact

that the Government changed its theory of the case from that which it alleged in the indictment, thereby seriously misleading the defendant in the preparation of his defense.

/s/ GERALD D. HILE,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1955.

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

The defendant moves the Court to arrest the judgment for the reason that the indictment does not state facts sufficient to constitute an offense against the United States.

/s/ GERALD D. HILE,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1955.

[Title of District Court and Cause.]

JUDGMENT AND SENTENCE

Now on this 19th day of September, 1955, this cause comes on before the Court for hearing on motion of defendant in arrest of judgment, and motion

for a new trial. Also for imposition of judgment and sentence on verdict of Guilty as charged in the Indictment. Motions are denied.

The cause is called, defendant Harold G. Bauer is present and with his counsel, Gerald D. Hile. Edward J. McCormick, Jr., represents the Government.

Judgment and sentence are pronounced. Later, the written Judgment, Sentence and Commitment, as orally pronounced, is signed in the presence of the defendant. Stay of execution of this judgment and sentence is granted until September 22, 1955, to permit defendant time within which to file an appeal. Defendant is to remain on personal recognizance bond in the sum of \$5,000.

United States District Court, Western District of
Washington, Northern Division

No. 49163

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAROLD G. BAUER,

Defendant.

JUDGMENT, SENTENCE AND
COMMITMENT

On this 19th day of September, 1955, the attorney for the Government, and the defendant, Harold G. Bauer, appearing in court and being represented by

Gerald D. Hile, his attorney, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given to the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof; that the Probation Officer of this District has made a presentence investigation and report to the Court, now, therefore,

It Is Adjudged that the defendant has been convicted by jury verdict and is guilty of the offense of violation of Title 12, U.S.C., Section 95(a), and Executive Order 6260, as amended, as charged in Count I of the Indictment, there being only one count in the Indictment herein, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged in Count I and is convicted.

It Is Adjudged and Ordered that as to Count I the defendant be committed to the custody of the Attorney General of the United States for confinement in King County Jail at Seattle, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Ninety (90) Days.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 19th day of September, 1955.

Stay of Execution of this judgment and sentence is granted until September 22, 1955, to permit defendant time within which to file an appeal.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved and Presented by:

/s/ WILLIAM A. HELSELL,
Assistant United States Attorney.

(Unlawful possession quantity of gold ingots.)

[Endorsed]: Filed September 19, 1955.

Entered September 20, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Harold G. Bauer,
3623 - 43rd Ave., W., Seattle, Washington.

Name and address of appellant's attorney—Gerald
D. Hile, 4502 California Avenue, Seattle, Wash-
ington.

Offense—Possession of gold bullion in violation of Title 12, U.S.C.A., Sec. 95(a) and Executive Order No. 6260 as amended.

Judgment and Sentence entered September 19, 1955, sentencing appellant to 90 days in King County Jail.

Appellant is on bail.

I, the above-named appellant, hereby appeal to the U. S. Court of Appeals for the 9th Circuit from the above-stated judgment and sentence.

Dated this 20th day of September, 1955.

/s/ HAROLD G. BAUER,
Appellant.

[Endorsed]: Filed September 20, 1955.

[Title of District Court and Cause.]

PERSONAL RECOGNIZANCE
BOND ON APPEAL

Know All Men by These Presents:

That I, Harold G. Bauer, as principal, am held and firmly bound unto the United States of America in the sum of Five Thousand Dollars (\$5,000.00) to be paid to the United States of America and to be levied of me and my lands, goods, chattels and tenements, to which payment, well and truly to be made, I bind myself, my heirs, my executors and adminis-

trators by these presents, sealed with my seal and dated the 20th day of September, 1955.

The condition of the above recognizance is such that lately at a District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said Court between the United States of America, plaintiff, v. Harold G. Bauer, defendant, Cause No. 49163, a judgment and sentence was rendered against the said Harold G. Bauer, defendant, and the said Harold G. Bauer having filed in the Clerk's office of said Court, Notice of Appeal in duplicate from said Judgment and Sentence in said suit, and said appeal is now regularly pending in the United States Court of Appeals in and for the Ninth Circuit Court, to be holden at San Francisco, California,

Now, therefore, if the said Harold G. Bauer surrender himself in execution of the judgment, upon it being affirmed or modified, or upon the appeal being dismissed, or that in case of the judgment being reversed and the cause remanded for new trial, he appear in the Court to which said Cause may be remanded for a new trial and render himself amenable to any and all lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue. This recognizance is deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

/s/ HAROLD G. BAUER.

Approved:

/s/ WILLIAM J. LINDBERG,
U. S. District Judge.

Approved and acknowledged before me the day
and year first above written.

/s/ WILLIAM A. HELSELL,
Assistant United States Attor-
ney.

[Endorsed]: Filed September 20, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant intends to rely upon the following
points on appeal:

1. The Indictment does not state facts sufficient
to constitute an offense against the United States.

2. Executive Order 6260, as amended, was not in
force on February 12, 1954, the date of the alleged
offense.

3. It was not a criminal offense against the
United States to possess gold bullion on February
14, 1954, the date of the alleged offense.

/s/ GERALD D. HILE,
Attorney for Appellant,
Harold G. Bauer.

Receipt of copy acknowledged.

[Endorsed]: Filed October 12, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) of the Federal Rules of Criminal Procedure, and designation of counsel, I am transmitting herewith the following original papers in the file dealing with the action, excluding exhibits, together with true copies of certain journal and docket entries, as the record on appeal from the Judgment, Sentence and Commitment filed Sept. 19, 1955, to the United States Court of Appeals for the Ninth Circuit at San Francisco, to wit:

1. Indictment, filed March 23, 1955.
3. Bench Warrant with Marshal's Return thereon, filed 3-28-55. Arraignment and Plea, Journal entry, March 28, 1955.
4. Appearance of Gerald D. Hile for Defendant, filed 4-15-55.
5. Motion of Deft. to Dismiss, filed 4-15-55. Order Denying Motion to Dismiss, Journal entry, 5-16-55. Record of Trial by Jury (Docket entries, July 26, 27, 28, 1955).
19. Verdict, filed July 28, 1955.

23. Motion for New Trial, filed Aug. 2, 1955.

24. Motion in Arrest of Judgment, filed Aug. 2, 1955. Order Denying Motions in Arrest of Judgment and for New Trial. (Journal entry Sept. 19, 1955.)

25. Judgment, Sentence and Commitment, filed Sept. 19, 1955.

26. Notice of Appeal, filed Sept. 20, 1955. Docket entry showing Notice of Appeal in duplicate, 9-20-55.

27. Bond on Appeal, filed Sept. 20, 1955.

30. Statement of Points on Which Appellant Intends to Rely on Appeal, filed Oct. 12, 1955.

31. Appellant's Designation of Record on Appeal, filed 10-12-55.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 18th day of October, 1955.

[Seal]

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14929. United States Court of Appeals for the Ninth Circuit. Harold G. Bauer, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 1, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 14929

HAROLD G. BAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED AND ADOPTION OF
STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant hereby adopts and designates the following as the record to be printed herein:

All of the items numbered 1 to 31, inclusive, of the typewritten Certificate of the Clerk of the U. S. District Court to Record on Appeal in this cause, dated October 18, 1955, and made by Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, Northern Division, and on file with the above-entitled Court.

Appellant further adopts as his Statement of Points on which Appellant Intends to Rely herein the said Statement of said Points heretofore filed with said District Court on October 12, 1955, by Appellant, being item No. 30 of said Certificate of Clerk, United States District Court, to Record on Appeal, on file with the above court.

/s/ GERALD D. HILE,

Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 26, 1955.

No. 14929

**United States Court of Appeals
For the Ninth Circuit**

HAROLD G. BAUER, *Appellant*,

VS.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

GERALD D. HILE and
ALVIN J. ZIONTZ,
Attorneys for Appellant.

4502 California Avenue,
Seattle 16, Washington.

THE ARGUS PRESS, SEATTLE

FILED

MAR 21 1956

No. 14929

**United States Court of Appeals
For the Ninth Circuit**

HAROLD G. BAUER, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
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BRIEF OF APPELLANT

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INDEX

	<i>Page</i>
Jurisdiction	1
Statement of the Case.....	2
Specification of Errors.....	3
Argument for Appellant.....	4
I. Executive Order 6260 Was Not in Force on February 12, 1954, the Date of Appellant's Al- leged Offense	4
A. Background Analysis of the Executive Or- der and Statutes Involved.....	5
B. Argument	18
II. It Was Not a Criminal Offense Against the United States to Possess Gold Bullion on Feb- ruary 12, 1954, the Date of the Alleged Offense	30
III. The Indictment Does Not State Facts Suffi- cient to Constitute an Offense Against the United States	34
Conclusion	39
Appendix	41
U.S.C.A. Title 12, §95a.....	41
Executive Order No. 6260, Aug. 28, 1953, as amended by Ex. Ord. No. 6556, Jan. 12, 1934; Ex. Ord. No. 6560, Jan. 15, 1934.....	42
U.S.C.A. Title 12, §213.....	47
U.S.C.A. Title 31, §442.....	47
§443.....	48
50 U.S.C.A. App., §617.....	48

TABLE OF CASES

<i>Campbell v. Chase Nat. Bank of City of New York</i> , 5 F.Supp. 156.....	10, 31, 33
<i>Chastleton Corp. v. Sinclair</i> , 264 U.S. 543, 44 S.Ct. 405, 68 L.ed. 841 (1924).....	21, 22, 23, 25
<i>Dist. of Col. v. McKee</i> (C.C.A. D.C.) 24 F.(2d) 894	23
<i>Estep v. United States</i> , 327 U.S. 114.....	20
<i>Farber v. United States</i> , 114 F.(2d) (C.C.A. 9).....	27
<i>Federal Communications Com. v. American Broad- casting Co.</i> , 247 U.S. 284, 74 S.Ct. 593, 98 L.ed. 699	19

	<i>Page</i>
<i>First Natl. Bank of Birmingham v. Jaffe</i> , 239 Ala. 567, 196 So. 103 (Ala. 1940).....	24
<i>First Trust Co. of Lincoln v. Smith</i> , 134 Neb. 84, 277 N.W. 762	24-25
<i>First Trust Joint Stock Land Bank of Chicago v. Arp</i> , 225 Ia. 1331, 283 N.W. 441 (Iowa 1939).....	25
<i>Fuller v. United States</i> , 114 F.(2d) 698 (C.C.A. 9, 1940)	37, 38
<i>Home Bldg. and Loan Assn. v. Blaisdell</i> , 290 U.S. 398, 54 S.Ct. 231, 78 L.ed. 413.....	22, 24, 25
<i>Hull v. Rolfsrud</i> , N.D., 65 N.W.(2d) 94 (N. Dakota 1954)	25
<i>Jefferson Standard Life Ins. Co. v. Noble</i> , 185 Miss. 360, 188 So. 289.....	24
<i>Norman v. B. & O. R. Co.</i> , 294 U.S. 240.....	7
<i>Panama Refining Co. v. Ryan</i> , 293 U.S. 388, 55 S.Ct. 241, 79 L.ed. 446.....	19
<i>Peck v. Fink</i> (C.C.A. D.C.) 2 F.(2d) 912 (certiorari denied 226 U.S. 631)	22
<i>Petition of Olesen</i> , 68 S.D. 435, 3 N.W.(2d) 880.....	25
<i>Pouquette v. O'Brien</i> , 55 Ariz. 248, 100 P.(2d) 979..	25
<i>Ruffino v. United States</i> , 114 F.(2d) 696 (C.C.A. 9, 1940)	27, 37
<i>Safeway Stores v. Botti</i> , 137 N.J.L. 437, 60 A.(2d) 318 (N.J. 1948).....	23
<i>Toledo, P. & W. R. R. v. Stover</i> , 60 F.Supp. 587 (D.C. Ill. 1945)	20
<i>United States v. L. Cohen Grocery Co.</i> , 255 U.S. 81, 51 S.Ct. 298, 65 L.ed. 516.....	18
<i>United States v. Driscoll</i> , 9 F.Supp. 454.....	33
<i>United States v. Grimaud</i> , 220 U.S. 506, 41 S.Ct. 480, 55 L.ed. 563	18
<i>United States v. Halseth</i> , 342 U.S. 277, 72 S.Ct. 275, 96 L.ed. 308	19
<i>United States v. Resnick</i> , 229 U.S. 207, 57 S.Ct. 126, 81 L.ed. 127	19
<i>Whaley v. Norment</i> (C.C.A. D.C. 6) F.(2d) 716.....	23

TEXTBOOKS

Page

11 Am. Jur., Constitutional Law, Sec. 244, p. 965.....	18
20 Am. Jur., Evidence, Sec. 18, p. 49.....	24
27 Am. Jur., Indictments and Informations, Sec. 106, p. 666	38
Beard, Charles A., & Smith, George H. E., "The Future Comes," N.Y. 1933.....	6
31 C.J.S., Evidence, Sec. 63, p. 643-648.....	24
42 C.J.S., Indictments and Informations, Sec. 140, p. 1043	38
Vol. II, Cyclopedia of Federal Procedure, Indictments and Information, Sec. 42.59.....	38
Vol. 2, Encl. Britannica, 1943 Ed., p. 555.....	36
Lapp, John A., "The First Chapter of the New Deal," Chicago 1933.....	6-7
Shepard, O. C., & Dietrich, W. F., "Fire Assaying," First Ed. N.Y. 1940, p. 172.....	36

JOURNALS AND PERIODICALS

Congressional Record, Vol. 77, Part 1.....	8, 9, 13, 14
Congressional Record, Vol. 78, Part 1, p. 1010.....	14
Congressional Record, Vol. 87, Part 9.....	16, 17
1941 U. S. Code Congressional Service, p. 1032.....	15
Address of President Roosevelt Before Governors' Conference at White House, March 6, 1933.....	7

STATUTES AND ACTS

12 U.S.C.A. 95(a) (Act of March 9, 1933, 48 Stat. 1)	1, 3, 4, 5, 8, 11, 13, 14, 15, 17, 19, 21, 26, 27, 28, 29, 30, 31, 32, 34, 37, 41
12 U.S.C.A., Sec. 213, Act of Dec. 18, 1941 (First War Powers Act) 55 Stat. 838.....	13, 28, 29, 47
31 U.S.C.A., 442, 443 (Gold Reserve Act of 1934, 48 Stat. 343)	12, 13, 29, 32, 47, 48
50 U.S.C.A. App. Sec. 5(b) (Trading with the Enemy Act) (Act of Oct. 6, 1917, 40 Stat. 411, 415)	5, 7, 8, 14, 15
50 U.S.C. App. Sec. 617.....	15, 16, 48
55 Stat. 838	14

ADMINISTRATIVE REGULATIONS

	<i>Page</i>
31 C.F.R. 1954 Pocket Supp.....	36
31 C.F.R. 1955 Supp. Sec. 54.12	35
Sec. 54.4(8)	36
Sec. 54.17	36
Sec. 54.18	35
Sec. 54.21	35
Sec. 120.1	7
Sec. 120.2	7
Sec. 120.3	9
17 F.R. No. 84, p. 3769.....	26
17 F.R. 3813	17

PROCLAMATIONS AND EXECUTIVE ORDERS

Proclamation 2039, March 6, 1933.....	7
Proclamation 2040, March 9, 1933.....	7
Proclamation 2974, April 29, 1952.....	17
Executive Order 6073, Mar. 10, 1933.....	9
Executive Order 6102, April 5, 1933.....	10
Executive Order 6260, Aug. 28, 1933.....	3, 4,
10, 16, 17, 18, 21, 23, 27, 28, 29, 30, 31, 32, 34, 37, 39,	41
Executive Order 6556, Jan. 12, 1934.....	42
Executive Order 6560, Jan. 15, 1934.....	42
Executive Order 10348, April 26, 1952.....	26

COURT RULES

Federal Rules of Criminal Procedure, 18 U.S.C.	
Rule 37	2
Rule 39	2
Rules of the Court of Appeals, Ninth Circuit, Rule	
39	2

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,	<i>Appellee.</i>	} No. 14929
vs.		
HAROLD G. BAUER,	<i>Appellant,</i>	

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTION

The Grand Jury for the Western District of Washington, Northern Division, returned an indictment consisting of One Count, charging the appellant, Harold G. Bauer, with possession of gold bullion in violation of Title 12, U.S.C., Section 95(a), and Executive Order 6260, as amended (R. 3). On March 28, 1955, the appellant was arraigned and pleaded not guilty (R. 5-6). On July 26, 1955, the appellant was tried to a jury and on July 28, 1955, a verdict of guilty as charged in the indictment was returned by the jury. On September 19, 1955, the appellant was adjudged to be guilty, as charged in Count 1 of the indictment, and was convicted. It was further adjudged and ordered that the appellant be confined in the King County jail at Seattle, Washington, or another institution for a period of ninety (90) days.

The judgement, sentence and commitment were entered on September 20, 1955. On September 20, 1955, the

appellant gave timely notice of appeal (R. 13, 14) in accordance with Rule 37 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.) and perfected the same in accordance with Rule 39 of the Federal Rules of Criminal Procedure and the Rules of the Court of Appeals, Ninth Circuit.

STATEMENT OF THE CASE

The appellant, Harold G. Bauer, was indicted on March 23, 1955, by Grand Jury for the Western District of Washington, Northern Division, which returned the following indictment:

"COUNT I

"The Grand Jury charges:

"That on or about the 12th day of February, 1954, at Seattle, within the Northern Division of the Western Division of the Western District of Washington, the defendant, Harold G. Bauer, then and there not being a person permitted to hold in his possession or retain a legal and equitable interest in gold bullion by any regulation issued by the Secretary of the Treasury and approved by the President of the United States, did then and there wilfully, unlawfully and knowingly hold in his possession and retain a legal and equitable interest in gold bullion in excess of the value of One Hundred Dollars (\$100.00) and in excess of Thirty-Five (35) fine Troy ounces, to-wit, approximately Fifteen (15) crucible-shaped gold ingots of a total gross weight of approximately Three Hundred Thirty-Eight and 90/100 (338.90) ounces, situated in the United States, and owned by a person subject to the jurisdiction of the United States, without a duly issued license authorizing and permit-

ting him to so hold in his possession and retain a legal and equitable interest in said gold bullion.

“All in violation of Title 12, U.S.C., Section 95 (a), and Executive Order 6260, as amended.

“A True Bill.” (R. 3, 4)

The appellant pleaded not guilty and was granted leave to move against the indictment (R. 5, 6). On May 16, 1955, the appellant, by his counsel moved that the case be dismissed for the reason that the indictment failed to allege facts sufficient to constitute a crime by the appellant against the laws of the United States of America. Appellant's motion was denied (R. 7). Defendant was tried to a jury and found guilty (R. 8). Prior to judgment and sentence, the appellant moved in arrest of judgment on the ground that the indictment did not state sufficient to constitute an offense against the United States. This motion was denied (R. 10, 11). From a judgment and sentence entered by the Honorable William J. Lindberg, United States District Court, Western District of Washington, Northern Division, the appellant has appealed.

SPECIFICATION OF ERRORS

1. The trial court erred in refusing to dismiss the indictment on the appellant's motion to dismiss. (R. 7)
2. The trial court erred in denying appellant's motion in arrest of judgment. (R. 10)
3. The trial court erred in entering judgment on the verdict, adjudging the defendant guilty of the offense of violation of Title 12, U.S.C., Section 95(a), Executive Order 6260, as amended, as charged in Count 1 of the indictment.

ARGUMENT FOR APPELLANT

I.

Executive Order 6260 Was Not in Force on February 12, 1954, the Date of Appellant's Alleged Offense.

The appellant, Harold G. Bauer, was indicted and charged with possession of gold bullion. The Government alleged that such possession constituted a violation of Title U.S.C.A. Sec. 95(a) and Executive Order 6260, as amended, promulgated thereunder. Title 12 U.S.C.A. 95(a), as it existed on February 12, 1954, the date of the alleged offense, and so far as here relevant reads as follows:

“During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

“(A) investigate, regulate, or prohibit * * * the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities * * *

“by any person, or with respect to any property, subject to the jurisdiction of the United States;
* * *

“(3) * * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; * * *

Executive Order 6260 promulgated on August 28, 1933, declared a period of National emergency and provided in Section 5, as follows:

“After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order provided; however, that licenses shall not be required in order to hold in possession or retain an interest in gold coin, gold bullion, or gold certificates with respect to which a return need not be filed under section 3 hereof.”

The executive order further provided (Section 9) that the Secretary of the Treasury was authorized to issue regulations for the purpose of carrying out the order.

The appellant is charged with having wilfully violated the provisions of Executive Order 6260, thus subjecting himself to criminal liability under 12 U.S.C.A. 95(a). It is the contention of the appellant that Executive Order 6260 was of no force or effect on February 12, 1954, the date of the alleged offense, and in fact had long since ceased to be of any legal effect.

A. Background Analysis of the Executive Order and Statutes Involved.

Before discussing the present status of Executive Order 6260, it is necessary to examine the background of this order and 12 U.S.C.A., Section 95(a), the statute on which it is based. On October 6, 1917, Congress, concerned with meeting the exigencies of the First World War, enacted The Trading with the Enemy Act of 1917 (40 Stat. 411). The act delegated various powers to the President, dealing with the war time emergency, and Section 5(b) of the act read as follows:

“That the President may investigate, regulate, or prohibit under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transaction in foreign exchange, export, or earmarking of gold or silver coin, or bullion, or currency, * * * by any person in the United States;”

After World War I, The Trading with the Enemy Act was not repealed but lay dormant. In 1929 the United States entered the era which has since come to be known simply as “The Depression.” On March 4, 1933, when Franklin D. Roosevelt was inaugurated as President the nation faced an extreme banking and monetary crisis. The banks in every state were either closed or operating under severe restrictions. The immediate cause of the closing of the banks was the run upon the Federal Reserve banks for gold. Under the laws and established practices then existing, all forms of money had been redeemable in gold merely by presentation to the Federal Reserve bank or to the Treasury. In practice, the exchange was made without any question. When the financial crisis deepened, the people began to exchange their currency for gold, and to hoard the gold. The Federal Reserve banks continued to pay out gold and the supply was rapidly sinking. In the ten days before March 4, close to \$1,550,000,000.00 was withdrawn from the Federal Reserve system. The net loss of gold through earmarkings and other operations approximated 169.4 millions of dollars in February and 113.3 millions in March before the outflow was stopped. (See the following reference material: *The Future Comes* by Charles A. Beard and George H. E. Smith, New York 1933; The first chapter of *The New Deal*

by John A. Lapp, Chicago, 1933. For a description of the conditions constituting the national emergency of 1933, see the oral argument of the Attorney General in *Norman v. B. & O. R. Co.*, 294 U.S. 240, beginning at page 253.)

On March 6, 1933, the President issued Proclamation 2039 (Codified 31 CFR, Sec. 120.1) declaring a national bank holiday for all banking institutions in the United States, from March 6, 1933 to March 9, 1933. This bank holiday was later extended indefinitely by Proclamation 2040. (Codified 31 CFR, 120.2)

The foregoing proclamations, in addition to declaring a bank holiday, also prohibited the export, import, and earmarking of gold bullion, and also prohibited banks from paying out any gold bullion. The President recited as his authority for these proclamations the old Trading with the Enemy Act of 1917. Since The Trading with the Enemy Act was solely a wartime act, there was in actuality no authority for these proclamations. It was simply a question of expediency. As President Roosevelt himself said, referring to his bank holiday proclamation,

“In that proclamation there were four or five main objectives. The first one was to prevent the withdrawal of any further gold and currency. The old War Statute of 1917 had not been repealed and we used it. It was an exceedingly useful instrument . . .” (From Address of President Roosevelt before the Governor’s Conference at the White House, delivered March 6, 1933.)

However, President Roosevelt had ready for submission to Congress a bill which amended The Trading

with the Enemy Act so as to make it available for use during emergencies declared by the President in addition to war time emergencies.

It is obvious even from the title of the bill, which became the Act of March 9, 1933, that it was passed purely because of the then most serious economic depression. The title to the Act of March 9, 1933, reads as follows:

“AN ACT

To Provide relief in the existing national emergency in banking, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application.”

See the following pages of the Congressional Record, Vol. 77, Part 1, March 4, 1933, pages 76 and 79 (House Debate) and Pages 49, 50, 52, 58, 63 and 66 (Senate Debate), for Congressional comment on the emergency nature of the Act.

The act amended The Trading with the Enemy Act of October 6, 1917 by adding the following italicized portions:

“During time of war or during any other period of national emergency declared by the President, the President may through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise, and transactions in foreign exchange, transfers of credit between or payments by bank-

ing institutions, as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin, of bullion or currency . . .”

In the congressional debate on the measure, one of the bill’s proponents, Senator Glass, in explaining the measure said:

“About the really arbitrary provision of the bill is that provision which authorizes the President, under the Act of October, 1917, to embargo gold payments and to penalize the hoarding of gold and currency. I do not know who there is with wisdom enough to define hoarding * * * but there is no difficulty in the world about following gold withdrawals to their destination and penalizing those people who are so unpatriotic as to accentuate this desparate situation by undertaking to deplete the gold of the banks. The banks themselves should have done that long ago * * * Under that provision of the bill I anticipate very little difficulty in tracking the gold down and in punishing, by fine and imprisonment if necessary, people who thus hoard their gold.” (Congressional Record, Vol. 77, Part 1, p. 58)

Throughout the debates on the bill, as recorded in the Congressional Record, it is continually referred to as, “a bill to provide relief in the existing national emergency.”

With the passage of the act on March 9, 1933, the President now had authority delegated to him by Congress to make emergency orders respecting gold and gold bullion, the violation of which would bring criminal sanctions. On March 10, 1933, the President issued Executive Order 6073 (Codified at 31 CFR, Sec. 120.-3). This executive order authorized the Secretary of

the Treasury to permit certain banks to reopen under his regulations, but prohibited the removal from the United States, or any place subject to its jurisdiction of "any gold coin, gold bullion, or gold certificates, except in accordance with regulations prescribed by or under license issued by the Secretary of the Treasury." On April 5, 1933, the President promulgated Executive Order 6102. (Set out in *Campbell v. Chase Nat. Bank of City of New York*, 5 F. Supp. 156 at 159.) By this executive order, the hoarding of gold was prohibited and all persons were required to deliver, on or before May 1, 1933, to stated banks "all gold coin, gold bullion and gold certificates," with certain enumerated exceptions. The holders of the gold were to receive "an equivalent amount of any other form of coin or currency, coined or issued under the laws of the United States." By a further order on April 20, 1933, additional restrictions were applied, dealing principally with the export of gold under license. The Secretary of the Treasury followed these orders with a series of regulations making them effectual.

Finally, on August 28, 1933, all the previous orders pertaining to gold were merged in a comprehensive order: Executive Order 6260.

Executive Order No. 6260 issued August 28, 1933 and which superseded the order of April 5, 1933, provided as follows, so far as here now material:

"By virtue of the authority vested in me by Section 5(b) of the act of October 6, 1917, as amended by Section 2 of the act of March 9, 1933, entitled 'An act to provide relief in the existing national emergency in banking and for other purposes,' 'I,

Franklin D. Roosevelt, President of the United States of America, do declare that a period of national emergency exists, and by virtue of said authority and all other authority vested in me, do hereby prescribe the following provisions for the investigation and regulation of the hoarding, earmarking, and export of gold coin, gold bullion, and gold certificates by any person within the United States or any place subject to the jurisdiction thereof. * * * ,”

The order goes on to provide that within fifteen days from the date of its issuance, every person owning gold coin, gold bullion, or gold certificates shall file a return giving complete information relative thereto. It then sets out certain categories of gold coin and gold bullion for which no return need be filed. It sets up licensing requirements for the acquisition and possession of certain named categories of gold coin and gold bullion and also for the earmarking and export of gold coin and gold bullion. The order further empowers the Secretary of the Treasury to issue regulations for the purpose of carrying out the order and then reiterates the penalty provisions found in section 95(a) of Title 12. (The relevant parts of the order are set out in full in the Appendix hereto.)

All of the aforementioned executive actions taken under 12 U.S.C. 95(a) were clearly of an emergency stop-gap nature. But on January 15, 1934, President Roosevelt in his message to Congress asked that the United States be established on a new permanent monetary basis, and laid down what he considered the requirements for a permanent policy with respect to gold. He said:

“Certain lessons seem clear. For example, the free circulation of gold coin is unnecessary, leads to hoarding, and tends to a possible weakening of national financial structure in times of emergency. The practice of transferring gold from one individual to another, as from the Government to an individual, within a nation, is not only unnecessary, but is in every way undesirable. The transfer of gold in bulk is essential only for the payment of international trade balances. Therefore, it is a prudent step to vest in the Government of a nation the title to and possession of all monetary gold within its boundaries and keep that gold in the form of bullion rather than in coin.”

He then went on to say,

“With the establishment of this *permanent* policy, placing all monetary gold in the ownership of the Government as a bullion base for its currency, the time has come for a more certain determination of the gold value of the American dollar.” (Emphasis supplied.)

The legislation requested by President Roosevelt was passed on January 30, 1934, and came to be known as The Gold Reserve Act of 1934 (48 Stat. 343). The act is now codified in 31 U.S.C.A., Section 442 of which provides in substance that the Secretary of the Treasury shall by regulation issued under this section, “prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported or earmarked.” Section 443 provides in substance that any gold acquired or held in violation of certain enumerated statutes or any regulations issued by the Secretary of Treasury, shall be forfeited to the Government and in addition any person failing to

comply with the enumerated statutes or any regulations thereunder shall be subject to a penalty equal to twice the value of the gold so seized or involved. (Sections 442 and 443 are set out in full in the Appendix hereto.)

Another section of The Gold Reserve Act, which should be noted, is Section 13, now codified at 12 U.S.C.A. Section 213 (Set out in full in the Appendix hereto). This section provides Congressional approval, ratification and confirmation of all actions, regulations and orders *theretofore* taken by the President or the Secretary of the Treasury.

Section 213 is strikingly similar in form and purpose to section 1 of the Act of March 9, 1933 (48 Stat. 1). That section also undertook to confirm and ratify acts of the President taken prior to the passage of the Act of March 9, 1933. The necessity for Section 1 of the Act of March 9, 1933, grew out of the fact that the President had issued certain proclamations under the old Trading with the Enemy Act prior to the passage of the Act of March 9, 1933, and there was good ground to believe that his acts were indeed unauthorized. The section however, undertook to confirm acts not only done *theretofore* but also acts done *after* the passage of the act. The words used were "heretofore or hereafter." Senator Reed in the Congressional debate on the Act of March 9, 1933, commented on this section,

"If President Roosevelt should go beyond the section of The Trading with the Enemy Act, the approval we are giving him would be of no effect."
(Congressional Record, Vol. 77, Part 1, p. 63.)

The situation on January 30, 1934, was similar and the purpose of Section 213 of The Gold Reserve Act

was obviously to remove any doubts as to the legality of the President's acts done between the passage of the Act of March 9, 1933 and the passage of The Gold Reserve Act of 1934. It is interesting to note, however, that in the ratification provision in the 1934 act, the word "hereafter" was eliminated and Congress merely confirmed acts done "heretofore." In referring to this section, one Congressman pointed out,

" * * * Ratifying all these orders is an utterly useless thing to do. The last one of these orders was issued pursuant to legislation, in which we gave the President or Secretary of the Treasury wide authority in these matters.

"If they exceeded their authority, full ratification at this time would not better the situation any. If they issued orders contrary to the constitution, such ratification as we might make at this time would serve no purpose." (Congressional Record, Vol. 78, Part 1, p. 1010, Remarks of Representative McGugin)

After the passage of The Gold Reserve Act of 1934, we find no further congressional action taken with respect to 12 U.S.C. 95(a) or Executive Order 6260 until 1941. In 1941, with the outbreak of World War II, Congress again hastened to grant to the President certain emergency powers. Especially pressing was the need for authority in the President to deal with the property of foreign nationals. The Trading with the Enemy Act of 1917 was once again pressed into service. This was done by Congress in the First War Powers Act of December 18, 1941. (55 Stat. 838.) Title III of this act amended the Trading with the Enemy Act by adding provisions relating to the powers of the Presi-

dent in connection with the property of foreign nationals and foreign countries. The structure and language of 12 U.S.C. 95(a), however, was retained, and the punishment provision was left unchanged from the original provision in the Trading with the Enemy Act (40 Stat. 411, Sec. 16), and which was retained in the Act of March 9, 1933. (48 Stat. 1, Sec. 2.) With the addition of the 1941 provisions relating to dealings in the property of foreign nationals and foreign countries during time of war, the statute was brought into its presently existing form as it is found in Title 12 U.S.C.A., Section 95(a).

It is interesting to note that Title IV of the First War Powers Act limited the operation of certain portions of the Act to the duration of the war plus six months, but set no time limit on the operation of Title III of the Act, which contained the Trading with the Enemy Act. The explanation given in the 1941 U.S. Code Congressional Service is as follows (p. 1032):

“Title IV (of the First War Powers Act) provides a time limit for Titles I and II of the bill * * *. The provisions of Title III *are limited by their own terms* and thus do not require a special termination date.” (Emphasis supplied.)

The First War Powers Act also contained a ratification provision similar in form to the ones noted earlier in the Gold Reserve Act and the Act of March 9, 1933. This provision was Section 302 of the Act, now codified at 50 U.S.C.A., App. Section 617. It provided congressional ratification of actions *theretofore* taken by the President or the Secretary of the Treasury under the Trading with the Enemy Act. (This section is set out in full in the Appendix hereto.)

Lest it be assumed that in enacting this ratification provision in 1941, Congress was concerned over the status of Executive Order 6260, or any such Presidential act occurring during the early days of the New Deal, we shall refer briefly to the congressional debate on Section 617, which was Section 302 of the House and Senate bills. Following is the comment of Representative Hancock (Representative Hancock was a member of the House Judiciary Committee, which reported the bill out and was explaining its provision to the House) :

“Section 302 is a very common sort of clause, a sort of saving clause, that is put into many bills of this kind. I assume that the real purpose of it is to legalize certain *seizures, contracts and censorships* that have already been made *in anticipation of the passage of this bill.*” (Congressional Record, Vol. 87, Part 9, p. 9862.) (Emphasis supplied.)

And the comment of Mr. Kefauver :

“ * * * It was explained to us by representatives of the Treasury that it was absolutely necessary for the present act—5(b)—to be re-enacted in order to enable the Treasury to carry out its policy of freezing certain credits and of handling certain financial interests during the war.” (Congressional Record, Vol. 87, Part 9, p. 9865.)

Finally we note the highly illuminating comment of Mr. Robinson, who is also a member of the House Judiciary Committee, and who in explaining Section 617, said :

“The bill that was brought to us was very broad indeed. It provided to make active and vitalize all acts, actions, regulations, rules, orders, and procla-

mations that had been made theretofore, from October 6, 1917, when the Trading with the Enemy Act was first passed. Amendments were adopted by our committee; but your committee realizing that *we must protect the government for its actions during recent months when it took over this \$7,000,000,000 of assets and property of foreign nations, made the necessary provisions in this bill.*'' (Congressional Record, Vol. 87, Part 9, p. 9866.) (Emphasis supplied.)

With the enactment of the First War Powers Act, more than fifteen years ago, we reach the last congressional reference to any of the actions taken by President Roosevelt under Section 95(a). In fact, it appears clearly from a reading of the congressional discussion surrounding the First War Powers Act that Congress was not at all concerned with President Roosevelt's depression activities, but was rather concerned over the legality of certain acts involving the seizure of property belonging to foreign nationals. The 1941 Act is therefore certainly not indicative of any congressional intent to revive or keep in force any executive orders or actions promulgated under 12 U.S.C.A. 95(a) back in 1933. In any event, the National Emergency of 1941 was terminated on April 29, 1952, by Presidential Proclamation No. 2974 (17 FR 3813).

An examination of the record therefore leads to the conclusion that Congress has had nothing to say about the action of the President under Executive Order 6260 since it passed the Gold Reserve Act in January of 1934. Nor has there been any mention of Executive Order 6260 by President Roosevelt or any succeeding president in any executive order or proclamation since

January 15, 1934, the date of promulgation of Executive Order 6560, which was the last amendment of Executive Order 6260.

B. Argument

The gravamen of appellant's alleged offense is the violation of the terms of the President's Executive Order 6260. It is fundamental that the denomination and definition of what is a criminal offense and the penalty to be imposed for its commission is a function of the legislative branch of Government. In our system of Government, the President is primarily the executive branch of the Government, and under the constitutional doctrine of separation of powers, it is fundamental that the executive has no authority to declare what acts shall constitute a criminal offense, nor can the legislative delegate such authority to him. 11 Am. Jur., Constitutional Law, Section 244, p. 965. The legislature may, however, provide that a violation of an executive order shall constitute a criminal offense. *U. S. v. Grimaud*, 220 U.S. 506, 55 L.ed. 563, 41 S.Ct. 480.

And where a statute does not provide that the violation of presidential regulations shall amount to a criminal offense, the regulations themselves are ineffectual to create such an offense. There must in all cases be statutory authority for declaring that an act amounts to a crime, and in addition the penalty must be fixed by the legislature itself. *U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 65 L.ed. 41 S.Ct. 298; *U. S. v. Grimaud*, *supra*.

Applying these principles, it is clear that whatever authority President Roosevelt had to create crimes relating to gold, must be found in the source of his au-

thority, 12 U.S.C.A., Sec. 95(a). His authority can certainly rise no higher than its source and must therefore be limited by the delegation of power contained in said section.

An analysis of Section 95(a) makes it clear that certain powers are delegated to the President to be used only under certain conditions. These conditions are, "during the time of war or during any other period of national emergency declared by the President." The statute goes on to provide a criminal penalty of a fine of \$10,000 or a prison sentence of ten years, or both, for violation of any orders made by the President under this Statute. It is a well-settled general rule that penal statutes are subject to a strict construction.

U. S. v. Resnick, 299 U.S. 207, 81 L.ed. 127, 57 S.Ct. 126;

Federal Communications Comm. v. American Broadcasting Co., 247 U.S. 284, 98 L.ed. 699, 74 S.Ct. 593;

U. S. v. Halseth, 342 U.S. 277, 96 L.ed. 308, 72 S.Ct. 275.

In view of the fact that Section 95(a) is merely a repository of powers available to the President under certain stated conditions, it is essential to the validity of the exercise of those powers that these conditions obtain.

In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L.ed. 446, 55 S.Ct. 241, the Supreme Court in dealing with the question of delegation or legislative powers said (p. 432):

"If the citizen is to be punished for the crime

of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown.”

And the court further went on to say that when an administrative agency is required as a condition precedent to an order, to make a finding of fact, the validity of the order must rest upon the needed finding. If it is lacking, *the order is ineffective*.

And in *Estep v. United States*, 327 U.S. 114, Justice Murphy in his concurring opinion (pages 126 and 127) said,

“Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency, and that it not be issued in such a way as to deprive the person of his constitutional rights.”

In *Toledo, P. & W. R. R. v. Stover*, 60 F.Supp. 587 (D.C. Ill. 1945), the Court said (page 593) :

“And where an executive exercises powers which are delegated to him by an enabling act, he must exercise the power so granted in substantial conformity with the conditions and requirements declared in the act. (Citing cases)

“It is upon such principles that our Government was founded. The executive department of our Government cannot exceed the powers granted to it by the constitution and Congress, and if it does exercise a power not granted to it, or attempts to exercise a power in a manner not authorized by statutory enactment, *such executive act is of no legal effect*.” (Emphasis supplied)

The appellant here is not attacking the validity of Section 95(a) of Title 12 U.S.C. Nor is he attacking the validity of Executive Order 6260 when it was issued. A cursory review of the conditions outlined above eliminates any doubt as to the existence of the conditions necessary for the President to exercise powers granted him under 95(a). It is clear that a national emergency existed on August 28, 1933, it is clear that the President did declare a period of national emergency based on the financial crisis then existing. It follows therefore that Executive Order 6260 was, in 1933, a perfectly valid emergency order. But it does not follow that an emergency order which is valid during the existence of the emergency out of which it arose remains valid, *ad infinitum*, regardless of the existence or non-existence of the emergency.

Executive Order 6260 was promulgated more than 22 years ago. It cannot be disputed that the order arose out of and was designed to meet a specific existing national emergency, to-wit: the Depression. True, it was part of a program of legislation which was to result in lasting changes in the American social and legal structure but there can be no doubt that in itself, 6260 was but an emergency measure. The emergency was the monetary and banking crisis in which the United States found itself in 1933.

The appellant cites to this Court a principle of law which has never been challenged. It is, that a law depending upon the existence of an emergency or other certain state of facts to uphold it, ceases to operate if the emergency ceases or the facts change. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.ed.

841 (1924). That case involved the validity of certain administrative orders issued under a statute declaring an emergency. The Supreme Court examined the validity of the statute and speaking through Justice Holmes, said:

“ * * * And still more obviously so far as this declaration looks to the future, it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed * * *. We need not enquire how far this court might go in deciding the question for itself, on the principles explained in *Prentis v. Atlantic Coast Manufacturing Company*, 211 U.S. 210, 227. See *Gardner v. Collector*, 6 Wall. 499; *South Ottawa v. Perkins*, 94 U.S. 260; *Jones v. United States*, 137 U.S. 202; *Travis v. Yale & Towne Manufacturing Company*, 252 U.S. 60, 80. These cases show that the Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law, and if the question were only whether the statute is in force today, upon the facts that we judicially know we should be compelled to say that the law has ceased to operate.”

The *Chastleton* case is still a leading case and has never been over-ruled. The principle of the *Chastleton* case has been approved in the following cases:

Home Bldg. and Loan Assn. v. Blaisdell, 290 U.S. 398, at pp. 443, 447, 54 S.Ct. 231, 78 L.ed. 413;

Peck v. Fink (C.C.A. D.C.) 2 F.(2d) 912 (certiorari denied 225 U.S. 631);

Whaley v. Norment (C.C.A. D.C.) 6 F.(2d) 716;
Dist. of Col. v. McKee (C.C.A. D.C.) 24 F.(2d)
 894;

Safeway Stores v. Botti, 137 N.J.L. 437, 60 A.
 (2d) 318 (N.J. 1948).

In the *Botti* case, above mentioned, a city ordinance of Jersey City, New Jersey, provided that retail meat stores should remain closed on Monday, because of conditions arising out of the war emergency. The defendants were convicted and fined for violation of the ordinance and appealed. The judgment of conviction was set aside and the Court said (page 319):

“ * * * The emergency which brought the regulation into being has long since ceased to exist and the ordinance has become *functus officio*.”

The Court went on to cite the principle of the *Chastleton* case and went on to say:

“The subsistence of the exigency upon which the continuation of the law depends is always open to judicial inquiry. The operation of the regulation itself could not validly outlast the emergency.”

And, on page 320:

“We take judicial notice of the complete cessation of the conditions which gave rise to the emergency found by the local legislative body.”

Under the principle of the *Chastleton* case, the conclusion is inescapable that if the National economic emergency which empowered the President to promulgate Executive Order 6260 has passed, then his order will have lapsed with the passing of the emergency. It is elementary law that the courts will take judicial notice of general economic conditions, their rise, continuance,

progress and termination. 31 C.J.S., Evidence, Sec. 63, pp. 643-648. It is also elementary law that the courts will take judicial notice of matters which are common knowledge. 20 Am. Jur., Evidence, Sec. 18, p. 49. Is there anyone in the United States today who doubts that the Depression has ended? It is common knowledge that the Depression is over, and that the particular emergencies which it brought with it have long since passed.

This truism has many times been recognized by the courts, especially in the so-called "mortgage-moratorium" cases. The validity of state mortgage-moratorium laws was upheld as a constitutional exercise of the States' police power in *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.ed. 413. The *Blaisdell* holding was based on the existence of the depression emergency. The mortgage moratorium issue arose again in many states when the legislatures attempted to continue these laws in effect several years after the depth of the depression had been reached.

The Alabama Court in *First Natl. Bank of Birmingham v. Jaffe*, 239 Ala. 567, 196 So. 103 (Ala. 1940), held that although the mortgage moratorium legislation was valid as an emergency measure taken to meet the economic emergency of the depression, it was no longer constitutional when the economic emergency had fully passed and the Court held that the emergency had fully passed by April of 1939. In *Jefferson Standard Life Ins. Co. v. Noble*, 185 Miss. 360, 188 So. 289, the Mississippi Court held the economic depression which had created emergency conditions had passed by 1938. The Nebraska Court in *First Trust Co. of Lincoln v. Smith*,

134 Neb. 84, 277 N.W. 762, held that the economic emergency no longer existed in 1937. The South Dakota Court found the economic depression had passed by 1941, *Petition of Olesen*, 68 S.D. 435, 3 N.W.(2d) 880. The Arizona Court found that the economic emergency had passed in 1937, *Pouquette v. O'Brien*, 55 Ariz. 248, 100 P.(2d) 979. See also *Hull v. Rolfsrud*, 65 N.W. (2d) 94 (N.D. 1954), in which the Court took judicial notice of the fact that the Great Depression existed in North Dakota from 1930 to 1940.

The Iowa Court in dealing with the same question in *First Trust Joint Stock Land Bank of Chicago v. Arp*, 225 Ia. 1331, 283 N.W. 441 (Iowa 1939), rendered a particularly succinct opinion on the subject. The Court, after quoting the language of the *Chastleton* case, as used in the *Blaisdell* case, went on to say (page 443) :

“Emergency in order to justify the intervention of the reserve police power must be temporary, or it cannot be said to be an emergency. If a so-called emergency exists beyond a temporary period then it is no longer an emergency but a status. * * * The existence of an emergency is necessarily a fact question. While declaration of the executive and pronouncements of the Legislature are entitled to great weight and should be carefully considered, yet, the fact question still exists, and this can be determined by record facts, history of current events, and common knowledge and information. In other words, a court, in determining the existence of an emergency, may and should take judicial notice of conditions existing at the time the emergency or its continued existence is questioned.”

The Court went on to find that although an emergency had existed in 1933, the depression conditions and the

emergency which accompanied them no longer existed in 1939 and on that basis declared the legislation unconstitutional.

From the foregoing cases, it is apparent that the courts of this country have taken judicial notice that the Depression came to an end certainly no later than 1940. These cases further support the rule that it is the duty of a court to take judicial notice of the conditions upon which legislation depends for its validity and to rule upon such validity in the light of the conditions it finds.

The life of Executive Order 6260 was limited, upon its face, to the duration of the national economic emergency of 1933. If there had been no such emergency the Executive Order would have been totally invalid in view of the President's impotency to declare acts criminal in the absence of legislative delegation of authority. The authority delegated the President by Section 95(a) is clearly limited to a period of emergency. If Executive Order 6260 would have had no validity from the very day of its promulgation, had there been no emergency to sustain it, can it be doubted that it has no validity today, when there is no emergency to sustain it? It is submitted that the proposition admits of no doubt.

The proper way to seek to continue in force a pre-existing executive order, which may have lapsed because of a cessation of the emergency upon which it is predicated, is by specific executive revival of such pre-existing order. A clear example of this is Executive Order 10348, issued by President Truman on April 26, 1952, 17 F.R. No. 84, page 3769. That executive order,

while having nothing to do with the question at issue here, specifically provided that certain executive orders of April 10, 1940, and August 20, 1948, and "all delegations, designations, regulations, rulings, instructions and licenses issued under such orders are hereby continued in force according to their terms for the duration of the period of the national emergency" proclaimed in 1950. It is submitted that the proper way to breathe life into an extinct executive order is by revival under a later executive order. There has never been any executive order issued reviving or continuing in force Executive Order 6260.

It should be noted in connection with Executive Order 6260, that the order has been held to be valid and effective and still extant. We do not here concern ourselves with those early cases challenging the constitutionality of 12 U.S.C.A. 95(a) or the constitutionality of the President's action under Executive Order 6260, but we do note the case of *Ruffino v. United States*, 114 F.(2d) 696 (C.C.A. 9), decided September 11, 1940. In the *Ruffino* case the Court made the comment (page 697) with reference to Executive Order 6260:

"This order remains extant."

The Court cited as authority for the proposition the case of *Farber v. United States*, 114 F.(2d) 5 (C.C.A. 9), decided July 27, 1940. The Court there upheld the validity of Executive Order 6260 on two grounds. The first was that the enactment of the Gold Reserve Act of 1934 did not repeal Section 95(a) and Executive Order 6260. The Court ruled that there was no inherent contradiction between the Gold Reserve Act and Executive Order 6260 and that the two were consistent. The second

ground was that by the ratification provision of the Gold Reserve Act (12 U.S.C.A. Sec. 213), Congress ratified all orders issued by the President under the Act of March 9, 1933, including necessarily Executive Order 6260, and hence, said the Court, Executive Order 6260 is valid and effective.

With reference to the Court's first point, namely, that there is no contradiction between the Gold Reserve Act and Executive Order 6260, we do not concern ourselves, for we do not challenge Executive Order 6260 on that ground. With reference to the Court's second point concerning the effect of the ratification provision we direct the Court's attention to the preceding discussion of the background of this section of the Gold Reserve Act of 1934. We there pointed out that the Congressional discussion on this provision makes it clear that Congress felt that the provision would not result in enlarging the President's powers beyond the limit set out in the enabling act, 12 U.S.C. Section 95(a). It is further to be noted that the ratification provision applies only to acts "*heretofore*" done by the President. The word "*heretofore*" clearly has reference to the period prior to the enactment of this provision on January 30, 1934. The effect of the ratification provision was to establish beyond any doubt the legitimacy of Executive Order 6260 as of the date it was issued, August 28, 1933, and as of the date it was ratified, January 30, 1934. But the fact that Executive Order 6260 had congressional ratification as of January 30, 1934, could not operate to transform the order from an executive act performed under specific legislative authority to a permanent piece of legislation in itself.

That Congress had no intention of effecting such a result is clearly indicated by the fact that the ratification provision contained in Section 1 of the Act of March 9, 1933 (48 Stat. 1) undertook to ratify all presidential acts theretofore *and thereafter* done. In the ratification provision contained in Section 13 of the Gold Reserve Act of 1934 (48 Stat. 343, 12 U.S.C.A. Section 213), the ratification applied only to acts *therefore* done.

That Executive Order 6260 was valid when promulgated, we do not deny. That it was valid after January 30, 1934, throughout the existence of the depression era, we also do not deny. And inasmuch as the *Ruffino* case was decided in 1940, we concede the possibility that the order could have been upheld even then on the grounds that (a) either the depression was not yet over or (b) that it was over so recently that it was only proper to sustain the executive order in order to deal with the emergency conditions which had not been entirely abated. But to contend that an order which depends for its validity upon the existence of an emergency remains valid some 23 years after its issuance is to deny the very meaning of the word, "emergency." To sustain such a position would mean serious consequences and far-reaching effects on the doctrines of "emergency legislation" and "emergency powers." To say that the nation's gold policy has continued down to the present day and that the provisions of the executive order are still needed is no answer. It is submitted that the Gold Reserve Act of 1934, a permanent piece of legislation, adequately covers the field. The only thing that Section 95(a) of Title 12 provides, which is not found

in the Gold Reserve Act, or the regulations of the Secretary of the Treasury thereunder, are criminal penalties. Should it be said that these criminal penalties are still desirable, the answer must be let Congress enact such penalties into permanent legislation. It is certainly no argument to say that a law is valid because it is needed. It is submitted, therefore, that Executive Order 6260 was not in force on Feb. 12, 1954, and it was therefore error to deny appellant's challenges to the indictment.

II

It Was Not a Criminal Offense Against the United States to Possess Gold Bullion on February 12, 1954, the Date of the Alleged Offense.

Even if Executive Order 6260 was in effect on February 12, 1954, it did not operate to make the acquisition or possession of gold bullion a criminal offense. It will be recalled that 12 U.S.C.A. Section 95(a) granted to the President the power, under certain prescribed circumstances, to "*investigate, regulate or prohibit* * * * the importing, exporting, hoarding, melting, or earmarking of gold * * * coin or bullion * * *." The President was thus given three separate and distinct powers by the act; (1) investigation, (2) regulation, and (3) prohibition.

On April 5, 1933, the President issued his first executive order under the act of March 9, 1933, and in such executive order he expressly invoked his power *to prohibit* the hoarding of gold bullion but he did not in such order invoke his power to investigate or regulate such. This first executive order does not appear in the Federal Register because such was not then in existence. It

is found, however, and quoted verbatim in *Campbell v. Chase National Bank*, 5 F.Supp. 156 at p. 160.

In Executive Order 6260, however, the President merely said,

“ * * * I * * * do hereby prescribe the following provisions for *the investigation and regulation* of the hoarding, earmarking, and export of gold coin, gold bullion, and gold certificates * * *.” (Emphasis supplied)

It is apparent that in Executive Order 6260, as promulgated and as it still exists, the President *never invoked the power to prohibit the hoarding, etc., of gold bullion*. He deliberately chose to abandon the invocation of prohibiting such, which he expressly invoked in his first executive order of April 5, 1933, and chose the more limited powers of investigation and regulation. This has never been changed.

That this was no oversight is apparent both by the earlier order and by Executive Order No. 6560, also promulgated under the authority granted the President by 12 U.S.C.A. 95(a) wherein the President declared “I, * * * do hereby prescribe the following regulations for *the investigation, regulation, and prohibition* of transactions in foreign exchange, * * *.” This later executive order No. 6560 is cited only for comparative purposes to demonstrate conclusively that the President did not choose to invoke his power to prohibit the acquisition of gold bullion. Having acted only under the authority to investigate and regulate the hoarding of gold coin, and gold bullion, it follows that the President in Executive Order 6260 could not and did not act to prohibit the hoarding of gold coin and gold bullion.

That Executive Order 6260 did not operate to prohibit the hoarding or holding in possession of gold bullion is made clear by reference to Section 442 and 443 of the Gold Reserve Act. Section 442 provides that the Secretary of the Treasury shall prescribe the conditions under which gold may be acquired and held. It then goes on to provide that “gold in *any form* may be acquired * * * or held in custody only to the extent permitted by * * * such regulations.”

It is clear that this section of the Gold Reserve Act does not regulate, nor investigate, but it *prohibits* the acquiring or holding of gold bullion contrary to the regulations of the Secretary of the Treasury. It is clear that if Executive Order 6260 prohibited the possession of gold bullion, then such act would constitute a violation of both Executive Order 6260 and the Gold Reserve Act. But when we look at Section 443 of the Gold Reserve Act, we find that such is not the case. Section 443 provides a civil penalty for the holding and acquisition of gold and specifically enumerates those statutes which such holding or acquisition would violate. Title 12 U.S.C.A. Section 95(a) is not among these enumerated statutes, nor is Executive Order 6260. It follows then that a violation of the Gold Reserve Act is not a violation of Executive Order 6260 so far as acquiring or holding gold bullion is concerned. This is because the executive order merely *regulates* and *investigates* the hoarding of gold bullion. Sections 442 and 443 of the Gold Reserve Act are designed to, and do, *prohibit* the acquisition and holding of gold, unless permitted by the act and the regulations of the Secretary of the Treasury thereunder.

Should it be asserted, however, that Executive Order 6260 does, by its terms, in spite of what has been said above, seek to prohibit acquisition of gold bullion by any person, then it is clear that such would be an invalid attempt to execute his uninvoked power to prohibit and be beyond the only presidential powers invoked, *i.e.*, investigation and regulation. See *Campbell v. Chase National Bank of City of New York*, 5 F.Supp. 156 and particularly pages 174, 175, 176 and 177 thereof, such being headnotes 21 and 22 of the case. See also *United States v. Driscoll*, 9 F.Supp. 454. We believe these cases are exactly parallel in reasoning to the point just made.

Several other striking features of the Gold Reserve Act should be noted.

1. The Gold Reserve Act was *not* emergency legislation and not predicated upon that feature nor is it predicated upon the country being at war;

2. The Gold Reserve Act prohibits the acquisition and holding of gold which may be in violation of the regulations which were approved by the President;

3. Their force and effect does not depend upon any executive order;

4. They do not impose any criminal penalty, merely a forfeiture plus a civil penalty of twice the value thereof; no fine or imprisonment penalties are imposed anywhere in the Gold Reserve Act;

5. The Act was passed January 30, 1934, which was subsequent to the Trading with the Enemy amendments above mentioned.

A careful reading of the Gold Reserve Act in com-

parison with 95(a) and Executive Order 6260 must lead to the conclusion that it was Congress' intent that the Gold Reserve Act pre-empt the field of permanent legislation prohibiting the holding or acquisition of gold by private individuals. And in view of the fact that the President in Executive Order 6260 did not invoke his powers to prohibit, and in view of the further fact that the Gold Reserve Act makes no mention of 95(a) or Executive Order 6260 in enumerating the statutes which are violated by possession or acquisition of gold, it is clear that Executive Order 6260 did *not* operate to prohibit the possession of gold bullion. Since Executive Order 6260 did not prohibit the possession of gold bullion, it was not, therefore, a criminal offense against the United States to possess gold bullion on February 12, 1954, the date of the alleged offense.

III

The Indictment Does Not State Facts Sufficient to Constitute an Offense Against the United States.

The indictment here charges the appellant with having held in his possession gold bullion, "*then and there not being a person permitted to hold in his possession or retain a legal and equitable interest in gold bullion by any regulation issued by the Secretary of the Treasury and approved by the President of the United States*" (R. 3).

One can search the statutes, the executive order and the regulations of the Secretary of the Treasury in vain to discover who is a person permitted to hold gold bullion by the Treasury regulations. The reason is that the Treasury regulations have nothing to say about *per-*

sons who may hold or possess gold. They concern themselves with the *conditions* under which gold may be acquired and held. Section 54.12 of the regulations of the Secretary of the Treasury contained in 31 C.F.R. 1955 Supp. reads as follows:

“Conditions under which gold may be acquired, held, melted, etc. Gold in any form may be acquired, held, transported, melted or treated, imported, exported, or earmarked only to the extent permitted by and subject to the conditions prescribed in the regulations in this part, or licenses issued thereunder.” (Emphasis supplied)

These regulations then go on to specify the conditions under which gold may be held without a license and the conditions under which a license is required. The indictment thus charges the appellant with the non-existent offense of holding gold while not being a *person* permitted to hold by Treasury regulation. It therefore does not charge an offense against the United States.

The indictment further charges that the appellant held in his possession gold bullion, “in excess of Thirty-five (35) Fine Troy Ounces, to-wit, approximately Fifteen (15) crucible-shaped gold ingots of a total gross weight of approximately Three Hundred Thirty-Eight and 90/100 (338.90) ounces” (R. 3). This section of the indictment is based on Sections 54.18 and 54.21 of the Treasury Gold Regulations which provide that a license shall be required to possess gold in quantities greater than a stated amount. Prior to 1954 the Treasury regulations set the limit at 35 fine troy ounces. In 1954, however, the Secretary of the Treasury amended

the regulations to raise the limit to *50 fine troy ounces*. Such amendment is contained in the 1954 pocket supplement to Vol. 31 C.F.R. Since the indictment merely charges the appellant with holding more than 35 fine troy ounces, it is submitted that it fails to charge an offense.

The indictment is further fatally defective in that although it charges the appellant with holding more than 35 *fine* troy ounces, it merely specifies 15 gold ingots weighing 338.90 ounces. It is submitted that it is no violation of Treasury regulations or any statute or executive order to possess ingots of metal with an undetermined or undefined gold content. It is the gold *content* that brings the metal within the Treasury regulations. Section 54.17 of the Treasury gold regulations makes this clear. It provides that no license shall be required for metals containing less than 5 troy ounces of *fine gold* per short ton. The regulations do not, however, contain any definition of the term, "fine gold." Reference to outside sources, however, reveals that the term "fine gold" is a term of art. The term "fineness" in this context is defined as the number of parts of gold in one thousand parts of alloy. See Vol. 2, Encl. *Britannica*, 1943 Ed. Article, "Assaying," page 555. In the field of assaying the term "fine gold bullion" is defined as bullion containing more than 99% gold and practically no silver. See "Fire Assaying" by O. C. Shepard and W. F. Dietrich, First Ed., N.Y. 1940, page 172.

Furthermore this indictment charges the appellant specifically with possession of "gold bullion," not merely "gold." The Treasury regulations, Section 54.4 (8) defines the term "gold bullion" as follows:

“ ‘Gold bullion’ means any gold which has been put through a process of melting or refining, and which is in such state or condition that its value depends primarily upon the gold content and not upon its form; the term ‘gold bullion’ includes, but not by way of limitation, semi-processed gold and scrap gold, but it does not include fabricated gold as defined in this section, metals containing less than five troy ounces of fine gold per short ton, or unmelted gold coin.”

It follows then that an indictment for illegal possession of gold bullion omits an essential element of the offense if it fails to state the gold content of the metal held in terms of fineness. This is illustrated by the indictment which this court upheld in the case of *Ruffino v. United States*, 114 F.(2d) 696 (C.C.A. 9 1940). The indictment there charged the acquisition of gold bullion, “in quantity particularly described as approximately 78.50 ounces of gold bullion estimated .840 fine.”

It is elementary law that an indictment must state every essential fact constituting the offense charged. The appellee will argue that the Government is not required to negative exceptions and that such exceptions are defensive matter. It is submitted by the appellant that a reading of Section 95(a), and the provisions of Executive Order 6260 and the regulation of the Secretary of the Treasury thereunder will make it abundantly clear that this is not merely a question of negating a simple exception to a general prohibition. Rather, here we are dealing with a complex body of statutory and regulatory provisions. And, as recognized in *Fuller v. U. S.*, 114 F.(2d) 698 (C.C.A. 9th, 1940), which also dealt with the Gold Regulations, where exceptions and

provisos are incorporated with the language defining the offense, as they are here, it is impossible to accurately and clearly describe the ingredients of the offense here sought to be charged if the defendant is not alleged to be outside the various exceptions and provisos of the executive order and the regulations thereunder. The applicable rule is well stated in Section 42.59, *Cyclopedia of Federal Procedure, Indictments and Informations*, Vol. II, 3rd edition, which reads as follows so far as here material:

“But the provisos or exceptions must always be negatived where it is a part of the description of the offense; and consequently, in doubtful cases it is better practice to negative the proviso or exception. *Where a statute makes certain acts unlawful if done without a license and excepts certain other acts from the license requirement, an indictment or information must specify the acts with sufficient precision to indicate that they come within the prohibitions rather than the exceptions of the statute.*”
(Emphasis supplied)

Many Supreme Court cases are cited in support of the foregoing rules. With respect to the last sentence above quoted, the author cites in support thereof *Fuller v. United States, supra*. See also 42 C.J.S., *Indictments and Informations*, Sec. 140, p. 1043, and 27 Am. Jur., *Indictments and Informations*, Sec. 106, p. 666.

It is therefore submitted that this indictment on each of the many grounds above stated is fatally defective and does not state facts sufficient to constitute an offense against the United States.

CONCLUSION

It is respectfully submitted that the appellant did not violate Executive Order 6260, as amended, and has committed no criminal offense because Executive Order 6260 was not in force on February 12, 1954, since it had ceased to be operative with the passing of the depression emergency.

It is further respectfully submitted that even if Executive Order 6260 was in force on the date of the alleged offense, nevertheless it did not operate to make the appellant's acts a crime for the reason that it did not prohibit such acts, since the President in the executive order did not invoke his power of prohibition. Therefore, it was not a criminal offense against the United States to possess gold bullion on February 12, 1954, the date of the alleged offense.

Finally, it is respectfully submitted that the indictment does not state facts sufficient to constitute an offense against the United States for the following reasons:

1. It charges the appellant with being a person not permitted to hold gold bullion—a non-existent offense or element of an offense.

2. It fails to allege the degree of fineness of the gold which the appellant is charged with possessing.

3. It charges the appellant with holding gold in a quantity which is *not* in excess of the quantity prohibited by regulation to be held without a license.

Therefore, it is respectfully submitted that the District Court erred in denying appellant's motion to dis-

miss the indictment and his motion in arrest of judgment.

Respectfully submitted,

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Attorneys for Appellant.

APPENDIX

Statutory material set forth herein includes those portions which are relevant to the matters discussed in appellant's brief.

U.S.C.A. Title 12

Sec. 95a. Embargo on bullion or coin; hoarding; requirement of disclosure; penalties.

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.

by any person, or with respect to any property, subject to the jurisdiction of the United States; * * *

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the

Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

EXECUTIVE ORDER No. 6260

Aug. 28, 1933, as amended by Ex. Ord. No. 6556, Jan. 12, 1934; Ex. Ord. No. 6560, Jan. 15, 1934

HOARDING, EXPORT, AND EARMARKING OF GOLD COIN, BULLION, OR CURRENCY; TRANSACTIONS IN FOREIGN EXCHANGE

By virtue of the authority vested in me by section 5(b) of the act of October 6, 1917 (section 95a of this title), as amended by section 2 of the act of March 9, 1933, entitled "An act to provide relief in the existing national emergency in banking and for other purposes," I, Franklin D. Roosevelt, President of the United States of America, do declare that a period of national emergency exists, and by virtue of said au-

thority and of all other authority vested in me, do hereby prescribe the following provisions for the investigation and regulation of the hoarding, earmarking, and export of gold coin, gold bullion, and gold certificates by any person within the United States or any place subject to the jurisdiction thereof; and for the investigation and regulation of transactions in foreign exchange and transfers of credit and the export or withdrawal of currency from the United States or any place subject to the jurisdiction thereof by any person within the United States or any place subject to the jurisdiction thereof.

Sec. 3. Returns—Within 15 days from the date of this order every person in possession of and every person owning gold coin, gold bullion, or gold certificates shall make under oath and file as hereinafter provided a return to the Secretary of the Treasury containing true and complete information relative thereto, including the name and address of the person making the return; the kind and amount of such coin, bullion, or certificates held and the location thereof; if held for another, the capacity in which held and the person for whom held, together with the post-office address of such person; and the nature of the transaction requiring the holding of such coin, bullion, or certificates and a statement explaining why such transaction cannot be carried out by the use of currency other than gold certificates; provided that no returns are required to be filed with respect to:

(a) Gold coin, gold bullion, and gold certificates in an amount not exceeding in the aggregate \$100 belonging to any one person;

(b) Gold coin having a recognized special value to collectors of rare and unusual coin;

(c) Gold coin, gold bullion, and gold certificates

acquired or held under a license heretofore granted by or under authority of the Secretary of the Treasury; and

(d) Gold coin, gold bullion, and gold certificates owned by Federal Reserve banks. * * *

Sec. 4. Acquisition of Gold Coin and Gold Bullion—No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin, gold bullion, or gold certificates except under license therefor issued pursuant to this Executive order, provided that member banks of the Federal Reserve System may accept delivery of such coin, bullion, and certificates for surrender promptly to a Federal Reserve bank, and provided further that persons requiring gold for use in the industry, profession, or art in which they are regularly engaged may replenish their stocks of gold up to an aggregate amount of \$100, by acquisitions of gold bullion held under licenses issued under section 5(b), without necessity of obtaining a license for such acquisitions, and provided further that collectors of rare and unusual coin may acquire from one another and hold without necessity of obtaining a license therefor gold coin having a recognized special value to collectors of rare and unusual coin (but not including quarter eagles, otherwise known as \$2.50 pieces, unless held, together with rare and unusual coin, as part of a collection for historical, scientific, or numismatic purposes, containing not more than four quarter eagles of the same date and design and struck by the same mint).

The Secretary of the Treasury, subject to such further regulations as he may prescribe, shall issue licenses authorizing the acquisition of—

(a) Gold coin or gold bullion which the Secretary is satisfied is required for a necessary and lawful transaction for which currency other than gold

certificates cannot be used, by an applicant who establishes that since March 9, 1933, he has surrendered an equal amount of gold coin, gold bullion, or gold certificates to a banking institution in the continental United States or to the Treasurer of the United States;

(b) Gold coin or gold bullion which the Secretary is satisfied is required by an applicant who holds a license to export such an amount of gold coin or gold bullion issued under subdivisions (c) or (d) of section 6 hereof, and

(c) Gold bullion which the Secretary, or such agency as he may designate, is satisfied is required for legitimate and customary use in industry, profession, or art by an applicant regularly engaged in such industry, profession, or art, or in the business of furnishing gold therefor.

Licenses issued pursuant to this section shall authorize the holder to acquire gold coin and gold bullion only from the sources specified by the Secretary of the Treasury in regulations issued hereunder (As amended by Ex. Ord. No. 6556, promulgated January 12, 1934).

Sec. 5. Holding of gold coin, gold bullion, and gold certificates—After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order; provided, however, that licenses shall not be required in order to hold in possession or retain an interest in gold coin, gold bullion, or gold certificates with respect to which a return need not be filed under section 3 hereof.

The Secretary of the Treasury, subject to such fur-

ther regulations as he may prescribe, shall issue licenses authorizing the holding of—

(a) Gold coin, gold bullion, and gold certificates, which the Secretary is satisfied are required by the person owning the same for necessary and lawful transactions for which currency, other than gold certificates, cannot be used;

(b) Gold bullion which the Secretary, or such agency as he may designate, is satisfied is required for legitimate and customary use in industry, profession, or art by a person regularly engaged in such industry, profession, or art or in the business of furnishing gold therefor;

(c) Gold coin and gold bullion earmarked or held in trust since before April 20, 1933, for a recognized foreign government or foreign central bank or the Bank for International Settlements; and

(d) Gold coin and gold bullion imported for re-export or held pending action upon application for export licenses.

Sec. 9. The Secretary of the Treasury is hereby authorized and empowered to issue such regulations as he may deem necessary to carry out the purposes of this order. Such regulations may provide for the detention in the United States of any gold coin, gold bullion, or gold certificates sought to be transported beyond the limits of the continental United States, pending an investigation to determine if such coin, bullion, or certificates are held or are to be acquired in violation of the provisions of this Executive Order. Licenses and permits granted in accordance with the provisions of this order and the regulations prescribed hereunder, may be issued through such officers or agencies as the Secretary may designate.

Sec. 10. Whoever willfully violates any provision of this Executive order or of any license, order, rule, or regulation issued or prescribed hereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

U.S.C.A. Title 12

Sec. 213. Ratification of acts of President and Secretary of Treasury—All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury, under sections 51a-51d, 95, 95a, 95b, 201-211, 212, 248, 347b-347d, and 445 of this title, or under sections 821 or 823 of Title 31, or under section 5, Appendix of Title 50, are hereby approved, ratified, and confirmed. Jan. 31, 1934, c. 6, Sec. 13, 48 Stat. 343.

U.S.C.A. Title 31

Sec. 442. Regulations for the acquisition and use of gold; exemption of gold held beyond continental United States—The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other purposes as in his judgment are not inconsistent with the purposes of sections 315b, 405b, 408a, 408b, 440-446, 752, 754a, 754b, 767, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12. Gold in any form

may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in places beyond the limits of the continental United States.

Section 443. Acquisition and use of gold in violation of law; penalties—Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of sections 315b, 405b, 408a, 408b, 440-446, 752, 754a, 754b, 767, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12 or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of said sections or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

50 U.S.C. App.

Section 617. All acts, actions, regulations, rules, orders and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of the President or the Secretary of the Treasury under the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411) as amended which would have been authorized if the provisions of this act and the amendments made by it had been in effect, are hereby approved, ratified and confirmed.

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY

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FILE

MAY 22 1956

PAUL R. O'BRIEN C.

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INDEX

	Page
I. STATEMENT OF JURISDICTION.....	1
II. STATEMENT OF THE CASE.....	2
III. SUMMARY OF ARGUMENT.....	3
IV. ARGUMENT	
A. Executive Order 6260 Was in Full Force and Effect on February 12, 1954.....	4
B. The Indictment Is Adequate to Charge Criminal Offense	10
SUMMARY AND CONCLUSION.....	15

TABLE OF CASES

<i>Chastleton Corp. v. Sinclair</i> , 264 U.S. 543.....	9
<i>Farber v. United States</i> , 114 F. 2d 5.....	4, 11, 12, 13
<i>Norman v. Baltimore & Ohio R. Co.</i> , 294 U.S. 240.....	8
<i>Ruffino v. United States</i> , 114 F. 2d 696.....	3, 4, 6, 10
<i>United States v. Catamore Jewelry Co.</i> , 124 F. Supp. 846	7
<i>United States v. Chabot</i> , 193 F. 2d 287.....	6
<i>United States v. Levy</i> , 137 F. 2d 778.....	5, 6

UNITED STATES CONSTITUTION

Art. I, Sec. 8, Par. 5.....	8
-----------------------------	---

STATUTES AND ACTS

12 U.S.C. 95a	2, 5, 6
12 U.S.C. 213	3
18 U.S.C. 3231	2

<i>ii</i>	STATUTES AND ACTS (<i>Continued</i>)	Page
28 U.S.C. 1291		2
Gold Reserve Act of 1934 (31 U.S.C. 440 et seq.).....	3, 4, 8, 9	
Trading with the Enemy Act, 1941 Amendment (50 U.S.C. App. 617)		3, 4, 9

EXECUTIVE ORDERS

Executive Order No. 6260.....	2, 3, 4, 5, 6, 7, 8, 10, 15
-------------------------------	-----------------------------

ADMINISTRATIVE REGULATIONS

31 C.F.R. 54.18.....	13, 14
31 C.F.R. 54.21.....	13, 14
19 F.R. 4309.....	13

COURT RULES

Federal Rules of Criminal Procedure, 18 U.S.C. Rule 18....	2
--	---

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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION

On March 23, 1955, the appellant, Harold G. Bauer, was charged by indictment in the District Court of the United States for the Western District of Washington, Northern Division, Cause No. 49163, with the unlawful ownership and possession of gold

bullion in violation of Title 12, United States Code, § 95a, and Executive Order 6260, as amended. Jurisdiction was conferred upon the District Court of the United States for the Western District of Washington, Northern Division, under the provisions of Title 18, United States Code, § 3231. Since the charge involved possession in the city of Seattle, within the Northern Division of the Western District of Washington, venue was laid in said District Court under the provisions of Rule 18 of the Federal Rules of Criminal Procedure.

The jurisdiction of this Court to review the judgment of the District Court is conferred by the provisions of Title 28, United States Code, § 1291.

II. STATEMENT OF THE CASE

Stripped to its essentials, the indictment in this case (R. 3, 4) charges that on February 12, 1954, at Seattle, Washington, the defendant, who was not a person permitted to own or possess gold bullion by any applicable United States Treasury regulation, nevertheless claimed an interest in and held in his possession 338.90 troy ounces of gold bullion without a duly issued United States Treasury license authorizing such ownership or possession. Appellant does not contest the sufficiency of the evidence to establish his

ownership or possession of the gold. He does not attack the sufficiency of the evidence establishing that the gold bullion was of a type and in such quantities as may not lawfully be possessed without a license. In this Court he attacks only the validity of the Executive Order under which he was charged and the sufficiency of the indictment to state a criminal offense.

III. SUMMARY OF ARGUMENT

Appellee contends that Executive Order 6260, as amended, was in force and effective on February 12, 1954, the date of commission of the offense. Executive Order 6260 was issued August 28, 1933. It was ratified and confirmed by the Gold Reserve Act of 1934 (12 U.S.C. § 213) and it was again approved and ratified by the 1941 amendment to the Trading with the Enemy Act (50 U.S.C., App. § 617). Its validity has been upheld by this Court and by all others which have passed upon the question.

Appellee further contends that the indictment in this case fully and completely states a criminal offense against the laws of the United States, committed by the appellant. It completely advised him of the charge against him and in fact the language of the indictment was, in part, extracted from indictments already held sufficient by this Court in *Ruffino*

v. United States, (9 Cir. 1940) 114 F. 2d 696, and *Farber v. United States*, (9 Cir. 1940) 114 F. 2d 5.

IV. ARGUMENT

A. *Executive Order 6260 Was in Full Force and Effect on February 12, 1954.*

Appellant has clearly delineated the issue before this Court. He does not contend that Executive Order 6260 was invalid when promulgated (Appellant's Brief, p. 29). He concedes that it was valid after January 30, 1934 (the date it was ratified by the Gold Reserve Act of 1934). Appellant further "concedes the possibility" (Appellant's Brief, p. 29) that the Executive Order was valid and in force in 1940 (as well he should in view of the express holding to that effect in *Ruffino v. United States*, *supra*, decided in 1940). Appellant, however, takes the position that Executive Order 6260 somehow withered and died during the years following 1940 and argues that such a conclusion is justified by the alleged absence of any further necessity for the Executive Order. Appellant takes this position despite the fact that the Executive Order was expressly again ratified by the provisions of the 1941 amendment to the Trading with the Enemy Act (50 U.S.C., App. § 617) and despite

the further fact that its validity has been sustained by cases since, the latest of which was decided in 1954.

Executive Order 6260 was authorized by the Act of March 9, 1933, and was an effective exercise of the power therein delegated to the President. In *United States v. Levy*, (2 Cir. 1943) 137 F. 2d 778, the Court said at page 781:

“But appellant nevertheless cannot succeed on this ground, for we are convinced that Executive Order 6260 was authorized by the Act of March 9, 1933. This court implied as much in *British-American Tobacco Co. v. Federal Reserve Bank of New York*, *supra*, 2 Cir., 104 F. 2d at page 654, in reasoning which we adopt. In answering the contention that the Act empowering the President to prohibit gold exporting or hoarding did not authorize its requisition for purchase, the Court said, per curiam: ‘What better means he could have devised to prevent its “export” or “hoarding”, we find it hard to imagine. The whole effort of Congress was to prevent the escape of gold, of which export and hoarding were almost, if not quite, the only available routes. These stopped, the emergency might pass; to stop them it was necessary to have the metal in all its forms where it could be found. That the owner could be compelled to accept the current price for it, has been decided for us; we have only to consider whether the order was within the power granted. We think it was.’”

Any possible question as to the validity of Executive Order 6260 at the time of its issuance is laid at rest by the subsequent ratification of the Order by

congressional pronouncements. In *United States v. Levy, supra*, it was further stated:

“To take the position most favorable to his [appellant’s] argument that Executive Order 6260 was unauthorized by the Act of March 9, 1933, we assume this [appellant’s possession of gold] occurred prior to January 30, 1934. For if it occurred thereafter, the congressional ratification then had would at least give Executive Order 6260 prospective validity against subsequent violations. *Ruffino v. United States*, 9 Cir., 114 F. 2d 696.”

In *Ruffino v. United States, supra*, this Court held as follows:

“By § 13 of the Gold Reserve Act of 1934, 48 Stat. 343, 12 U.S.C.A. § 213, Congress expressly ratified all orders issued by the President under the act of March 9, 1933, including, necessarily, Executive Order No. 6260. Hence we find no difficulty in holding that the order is valid and effective; and as has been seen it prohibits the acquisition of gold bullion except as therein indicated.”

In *United States v. Chabot*, (2 Cir. 1951) 193 F. 2d 287, the Court of Appeals for the Second Circuit discussed at length the operative effect and application of the Gold Reserve Act of 1934 with the provisions of Title 12, U.S.C. § 95a and the provisions of Executive Order 6260, as amended. That court was confronted with a criminal proceeding involving unlawful possession of gold bullion without a license and

from the tenor of the opinion it is apparent that as late as 1951 the Court of Appeals for the Second Circuit entertained no thought that the Executive Order was invalid or that the necessity for the legislation generally had disappeared.

The latest expression of opinion which can be found as to the validity of Executive Order 6260 is in *United States v. Catamore Jewelry Co.*, (D.C. Rhode Island 1954) 124 F. Supp. 846. The District Judge there stated at page 848:

“Executive Order No. 6260, as amended, made provision for the imposition of criminal penalties for wilful violations thereof. The Gold Reserve Act imposed only civil penalties for all violations whether wilful or otherwise of the regulations issued pursuant thereto. This act does not expressly repeal said Order in whole or in part. On the contrary, section 13 thereof, Title 12 U.S.C.A. § 213, expressly ratified all orders issued by the President under the Trading with the Enemy Act, as amended, including necessarily Executive Order No. 6260, as amended. In my judgment the provisions of section 4 of said Act, Title 31 U.S.C.A. § 443, cannot be said to repeal the penalty provisions of said Order and accordingly said Order was in full force and effect at all times mentioned in said Counts 1, 2, 3, 5, 7, 8, 9 and 10.” (citing cases)

It will be noted from the opinion that the indictment covered offenses committed “from on or about July 1, 1949, to and including February 1, 1950.”

Appellant argues that because the legislation in question was emergency legislation and because the emergency which spawned the law has ceased to exist, the law itself has ceased to operate. Although the promulgation of the Executive Order and the law which authorized it may well have been suggested by the *existence* of an emergency, there is little doubt that the *source* of the law and the *basis* therefor was the power entrusted to Congress to coin money and regulate the value thereof as provided by Art. I, Sec. 8, Par. 5 of the United States Constitution.

In *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, the Court stated with reference to gold legislation of the depression era, at page 304:

“The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide ‘a sound and uniform currency for the country,’ and to ‘secure the benefit of it to the people by appropriate legislation.’ *Veazie Bank v. Fenno*, 8 Wall. 533, 549.”

It does not follow that legislation motivated by the existence of an emergency but based on other valid powers entrusted to Congress under the Constitution, is nevertheless caused to expire by the termination of the emergency. Appellant in his brief (p. 11, 29) concedes that the Gold Reserve Act of 1934 expressly put the United States on a “new permanent mone-

tary basis". No good reason appears why Congress may not as a part of a permanent legislative policy adopt, ratify, and confirm Presidential executive orders earlier issued because an emergency existed. That is exactly what was done by the Gold Reserve Act of 1934 and by the Trading with the Enemy Act as amended in 1941. Counsel for appellant can cite no authority holding that such legislative practices are improper.

Appellant relies heavily on *Chastleton Corp. v. Sinclair*, 264 U.S. 543. He cites that case for the proposition that a law depending upon the existence of an emergency may cease to operate if the emergency ceases or the facts change. It may be conceded that under proper circumstances a law which depends upon the existence of an emergency for its validity *may* cease to operate when the emergency terminates. It is significant that the *Chastleton* case did not hold that the law in question *had* terminated. It simply returned the case to the lower court for the taking of evidence as to whether or not the facts giving rise to the emergency had ended. This Court can hardly take judicial notice that the facts creating the necessity for the gold legislation and the facts requiring the establishment of a new permanent monetary basis for the United States have terminated. Appellant made no effort in the court below to offer evi-

dence to that effect nor could he, for no such evidence is available. Yet he apparently would ask this Court to take judicial notice that sometime in the period after 1940 some change of condition occurred which made it unwise for this country to remain off the gold standard, which rendered the gold legislation unnecessary, and which resulted in the sudden demise of Executive Order 6260. It is significant that no case has ever so held and the matter has been considered by at least three courts since the decision of this Court in the *Ruffino* case.

B. *The Indictment Is Adequate to Charge Criminal Offense.*

Appellant first argues that the designation in the indictment of appellant as "not being a person permitted to hold in his possession or retain a legal and equitable interest in gold bullion by any regulation issued by the Secretary of the Treasury and approved by the President of the United States" is ineffective to establish that his possession of the gold bullion was unlawful.

The quoted language was extracted directly from the indictment which this Court passed upon in *Ruffino v. United States, supra*. The indictment in the *Ruffino* opinion, as shown by the quotation therefrom at page 697, stated:

“ ‘on or about the fifth day of July, 1939, at Sutter Creek in the County of Amador, within said division and district, said defendant *then and there not being a person permitted to acquire gold bullion by any regulation issued by the Secretary of the Treasury and approved by the President of the United States*, did then and there wilfully, unlawfully and knowingly acquire certain gold bullion, in quantity particularly described as approximately 78.50 troy ounces of gold bullion, estimated .840 fine’.” (Italics added)

This Court stated with reference to the charge in that indictment:

“While the indictment does not in terms aver that appellant was not within a class excepted by the executive order, it does charge that he was not a person permitted to acquire gold bullion pursuant to Treasury regulation. This language, we think, substantially negatives the possession of a license. The existence of a license was in any event defensive matter and it was not necessary to negative it. *Shelp v. United States*, 9 Cir., 81 F. 694.

“We hold the indictment sufficient to charge an offense denounced by 12 U.S.C.A. § 95a, and by the Presidential order No. 6260.”

It will be noted that the present indictment not only alleges that the appellant was not a person permitted to hold gold bullion by Treasury regulation, but it further alleges that he did not have a license permitting him to so hold the gold bullion. The additional phrase was inserted in the indictment upon the basis of the opinion of this Court in *Farber v. United States*,

(9 Cir. 1940) 114 F. 2d 5. It was there argued that the indictment did not sufficiently state an offense because it did not except all the possible conditions under which the appellant might have lawfully held gold coin in his possession. In sustaining the validity of the indictment in the *Farber* case and in answering the appellant's contention that it did not appear that the gold coins possessed were those prohibited by law, this Court stated:

"But appellant misreads the indictment. He reads it as though the clause 'not having a license * * * authorizing said acquisition of said gold coin by said defendant[s] as aforesaid' is but a general reference meaning no more than had the clause read 'not having a license authorizing the acquisition of gold coin generally'. But the clause is not cast in general terms. It is cast as a definite reference to the act alleged to be unlawful. In fact, to support appellant's interpretation, all that follows the description of the Executive Order might as well not be there, it adds nothing. As it is actually written, it plainly means that appellant acquired certain gold coins; that these gold coins were of such a nature as under the Executive Order could not legally be acquired by one not holding a license so to do. To put it another way, the clause 'authorizing said acquisition of said gold coin by said defendant[s] as aforesaid' does not refer to the acquisition of gold coins generally, but to the gold coins the subject of the alleged unlawful act. This being true, the indictment charges that without a license appellant acquired certain gold coins of the description which cannot be legally acquired without a license."

So in the case at bar the final phrase in the indictment before the Court reciting that the possession of the gold bullion by the defendant was "without a duly issued license authorizing and permitting him to so hold in his possession and retain a legal and equitable interest in said gold bullion" (R. 3, 4) has the direct effect of stating that the defendant was possessed of gold bullion which was in such form that it could not be legally acquired without a license. It is submitted that on the authority of the *Farber* case this is a complete answer to the suggestion by the appellant that the gold bullion referred to in the indictment was somehow not adequately described to identify it as a type of gold bullion which could not lawfully be possessed by this appellant.

Appellant makes the further point that because the indictment only alleges that he held more than 35 fine troy ounces it states no offense. Appellant's contention in this regard is predicated on the 1954 amendment to 31 C.F.R. § 54.18 and § 54.21 which raised the limitation on unmelted scrap gold or gold held for industrial, professional or artistic purposes which might be legally held without a license from 35 to 50 fine troy ounces. But appellant fails to note that the amendment to § 54.18 and § 54.21 of Title 31, C.F.R. was effective on July 14, 1954 (see 19 F.R.

4309). The indictment before the Court charges an offense which occurred on February 12, 1954, and appellant's offense was, of course, governed by the former version of 31 C.F.R. § 54.18 and § 54.21 which imposed the 35 ounce limitation.

SUMMARY AND CONCLUSION

It is submitted that Executive Order 6260, as amended, was in full force and effect on February 12, 1954, the date of the commission of the offense here involved. The Order was valid when issued, it has been subsequently ratified on two separate occasions, and its validity has been sustained by repeated decisions in different courts of appeal including this one. Appellant can find no reported case which even questions its present continuing validity.

It is further submitted that the indictment before this Court fully and fairly charges a criminal offense in violation of the Executive Order and the Federal statute. It was drafted in reliance on and by the adoption of other approved forms of indictment set out by opinions of this Court. It fully and fairly apprises the defendant of the charge against him. Appellant's contentions, and each of them, are without merit.

Respectfully submitted,

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INDEX

	Page
I. GROUNDS	1
II. ARGUMENT	
A. PROCEEDINGS IN THE COURT BELOW.....	3
B. EXECUTIVE ORDER 6260 IS VALID AS A MATTER OF LAW	4
C. IF FACTUAL EVIDENCE WAS NECESSARY TO A CONSIDERATION OF THE VALIDITY OF EXECUTIVE ORDER 6260, APPELLANT'S FAILURE TO OFFER EVIDENCE ON THAT ISSUE PRECLUDES FURTHER CONSIDERA- TION OF SUCH FACTUAL QUESTION.....	11
D. THE COURT SHOULD CLARIFY THE NA- TURE OF THE FURTHER PROCEEDINGS TO BE HAD IN THE COURT BELOW.....	15
III. SUMMARY AND CONCLUSION.....	17

TABLE OF CASES

<i>Chastleton Corp. v. Sinclair</i> , 264 U. S. 543.....	3, 14
<i>Dennis v. United States</i> , 341 U. S. 494	10
<i>Frazier v. United States</i> , 335 U. S. 497.....	13
<i>Glasser v. United States</i> , 315 U. S. 60.....	13
<i>Grand Trunk Western Railroad Company v. United States</i> , 252 U. S. 112, 64 L.Ed. 484.....	8
<i>Helvering v. Winmill</i> , 305 U. S. 79, 83 L.Ed. 52	8
<i>Hirabayashi v. United States</i> , 320 U. S. 81.....	10
<i>State of California v. Anglim</i> (9th Cir. 1942), 129 F. 2d 455	10
<i>United States v. Midwest Oil Company</i> , 236 U. S. 459, L.Ed. 673	8

TABLE OF CASES (*Continued*)

ii
Page

<i>Whitney v. California</i> , 274 U. S. 357.....	11, 12
<i>Wright v. United States</i> (C.A. - D.C. 1954), 215 F. 2d 498..	14
<i>Yakus v. United States</i> , 321 U. S. 414.....	16

STATUTES

61 Stat. 449.....	9
-------------------	---

CODE AND ACTS

12 U.S.C., Section 95a Trading with the Enemy Act of 1917, and Amend- ments	5, 9
12 U.S.C., Section 213 Gold Reserve Act of 1934.....	5
50 U.S.C. App., Section 617 First War Powers Act of December 18, 1941.....	5

EXECUTIVE ORDERS

Executive Order 6260.....	2, 3, 5, 6, 8, 9, 11, 13, 17
---------------------------	------------------------------

ADMINISTRATIVE REGULATIONS

Presidential Proclamation No. 2039, 31 C.F.R. 120.1.....	4, 6
Presidential Proclamation No. 2725, 31 C.F.R. 120.7.....	4
Presidential Proclamation No. 2914, 64 Stat. A454.....	5
17 F.R. 3831	7
19 F.R. 4309	8

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TO: THE HONORABLE WILLIAM HEALY, WILLIAM E. ORR, and JAMES ALGER FEE, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appellee, United States of America, aggrieved by this Court's Opinion dated January 29, 1957, respectfully petitions the Court for an *en banc* rehearing of this appeal.

I.

GROUND

Summarized, appellee's grounds for a rehearing *en banc* are:

1. This Court erred in failing to affirm the finding of the District Court that Executive Order 6260 was valid as a matter of law and in failing to decide the question of the validity of Executive Order 6260 as a matter of law.

A national emergency existed as a matter of law on February 12, 1954.

2. This Court erred in remanding the cause for further hearing before the District Court on the issue of the existence of a national emergency. If the existence or expiration of a national emergency requires the consideration of further factual evidence, such a presentation was a matter of defense on which evidence should have been offered in the court below by the appellant. Appellant's failure to offer evidence as to the expiration of a national emergency precludes further consideration of that question.

3. If a further hearing in the court below is justified this Court erred in failing to specify with clarity the nature of such a hearing.

II.

ARGUMENT

A. PROCEEDINGS IN THE COURT BELOW.

The opinion of this Court dated January 29, 1957, correctly recites at page 5 with reference to the question of the existence of a national emergency,

“ . . . the presentation as though the question were one of law was made.”

The question of the validity of Executive Order 6260 was raised by appellant in the District Court on motion to dismiss the indictment (Tr. 7). Although the motion to dismiss does not specifically charge that Executive Order 6260 was invalid, the contention was made under the broader challenge that the indictment: “ . . . fails to allege facts sufficient to constitute a crime by defendant against the laws of the United States of America.” (Tr. 7).

At the argument on appellant's motion to dismiss the case of *Chastleton Corp. v. Sinclair*, 264 U.S. 543, was cited to the District Court. In denying appellant's motion to dismiss, the District Court held Executive Order 6260 valid as a matter of law.

The question was again considered by the District Court and the validity of Executive Order 6260 was sustained as a matter of law at the time the District

Court denied appellant's motions in arrest of judgment (Tr. 10) and for new trial (Tr. 8).

B. EXECUTIVE ORDER 6260 IS VALID AS A MATTER OF LAW.

It is respectfully submitted that the treatment of this question as a purely legal issue by all parties and by the District Court was correct.

The national economic emergency declared by Presidential Proclamation No. 2039 of March 6, 1933 (31 C.F.R. 120.1), was never terminated. The continuing existence of the national emergency proclaimed in 1933, was expressly recognized by President Truman in 1947 when Proclamation No. 2039 was amended by Proclamation No. 2725 of April 7, 1947 (31 C.F.R. 120.7), excluding Federal Reserve Banks from the operation of the 1933 proclamation. Although the depression itself may have terminated, it does not follow that the emergency had also terminated. It is reasonable to assume that those persons in our Government charged with the enforcement of gold legislation considered that the threat of another depression was a sufficient cause to continue in force the earlier declaration of emergency. Unrestricted trafficking in gold could well have been a contributing cause to another depression.

It must not be forgotten that the gold legislation and particularly Executive Order 6260 has its basis not only in the power to regulate currency but also in the war power entrusted to Congress by the Constitution. The order was promulgated pursuant to the Trading with the Enemy Act of 1917 as amended by the Act of March 9, 1933 (12 U.S.C., Section 95a). Although the Executive Order was confirmed and ratified as an adjunct to the power to regulate the currency, in the Gold Reserve Act of 1934 (12 U.S.C., Section 213), it was further ratified and confirmed by an exercise of the war power in the First War Powers Act of December 18, 1941 (50 U.S.C. App., Section 617). It will thus be seen that Congress has indicated that the regulation of traffic in gold was desirable not only for purpose of preventing depression but for the purpose of enabling this country to wage war. In this connection it is significant that on December 16, 1950, President Truman declared the existence of a further national emergency by Proclamation No. 2914 (64 Stat. A454). This emergency arose out of the Korean situation. It had not been terminated on February 12, 1954, the date of appellant's unlawful possession of the gold in question.

It follows therefore that if a continuing emergency was necessary to sustain the continuing validity of Executive Order 6260 whether that emergency was

a war emergency or an economic emergency is of no consequence. The Executive Order was promulgated in 1933 under a statute which was an exercise of the war power but which had been amended by Congress in the exercise of its power to regulate the currency. It was ratified in 1934 by an exercise of the power to regulate currency (Gold Reserve Act of 1934), but was ratified in 1941 by an exercise of the war powers (First War Powers Act). Whatever type of emergency is deemed necessary to sustain the validity of Executive Order 6260 that emergency was present as a matter of law on February 12, 1954. The economic emergency of 1933 had never been terminated and a new war emergency which had been declared in 1950 also remained unterminated.

It is significant that the administrative construction given to Executive Order 6260 has consistently assumed the continuing existence of the requisite emergency and the continuing validity of Executive Order 6260. In 1947 President Truman amended Proclamation No. 2039 declaring the 1933 emergency. The Secretary of the Treasury who was empowered to issue gold regulations by the terms of Executive Order 6260 amended those regulations in 1952. At that time the Trading with the Enemy Act and Executive Order 6260 were included in the citation of authority. In connection with these revisions the Notice

of Proposed Rule Making published in the Federal Register on April 30, 1952 (17 F. R. 3831), reads as follows:

“The Gold Regulations are issued under the authority vested in the President in Section 5(b) of the act of October 6, 1917 * * * and delegated to the Secretary of the Treasury in Executive Order 6260, August 28, 1933 * * * the authority contained in sections 3, 8, 9, and 11, of the Gold Reserve Act of 1934 * * * and the authority with respect to the approval of Regulations delegated to the Secretary of the Treasury in Executive Order 10289, September 17, 1951 (16 F. R. 9499). The issuance of the Gold Regulations explicitly under the authority of Section 5(b) of the act of October 6, 1917, as amended, Executive Order 6260, Executive Order 6359, and Executive Order 9193, as well as the other authority cited is merely for the purpose of setting forth in detail existing law, e.g., that the prohibitions contained in said Act and Orders are still in full force and effect, that authorizations contained in the Gold Regulations or in licenses issued thereunder constitute authorizations under said Act and Orders, and that the penal provisions of said Act and Orders are applicable to violations of any provision of the Gold Regulations, of any license issued thereunder, or of any ruling, regulations, order, direction, or instruction issued by or pursuant to the direction of the Secretary of the Treasury pursuant to the Regulations in Title 31, Code of Federal Regulations, Part 54 or otherwise under Section 5(b) of the act of October 6, 1917, as amended.”

The Gold Regulations were further amended by the Secretary of the Treasury in 1954 and again the

Secretary of the Treasury included in the citations of authority Executive Order 6260 (see 19 F.R. 4309, July 14, 1954). While admittedly the declarations of the Secretary of the Treasury or the President to the effect that Executive Order 6260 provides authority for the promulgation of regulations, could ^{NOT} render the Order valid in the face of a contrary decision by this Court, the administrative construction placed on the emergency proclamation of 1933 and on Executive Order 6260 should be entitled to great weight. The actions of the Executive Branch of Government with reference to Executive Order 6260 indicate the firm conviction by responsible officials of that branch that the requisite emergency of either a war or economic nature continued through 1954.

The doctrine that administrative construction given to statutes is entitled to great weight is based on several factors. Among others is the presumption that illegal action by officers would not long go unchallenged, *United States v. Midwest Oil Company*, 236 U.S. 459, 59 L.Ed. 673; the inconvenience and prejudice which would result from changing settled constructions, *Grand Trunk Western Railroad Company v. United States*, 252 U.S. 112, 64 L.Ed. 484; and the implied consent of the legislature in not changing a provision of law which has received a long settled construction, *Helvering v. Winmill*, 305 U.S. 79, 83 L.Ed.

52. All of these factors are present in the situation here involved.

It should be noted that in 1947 Congress carefully reviewed the wartime emergency legislation and by joint resolution terminated certain emergency and war powers which had been created by many statutes. In the resolution of July 25, 1947, entitled "Joint Resolution to Terminate Certain Emergency and War Powers", 61 Stat. 449 - 454, Congress enumerated many emergency statutes and repealed those statutes which had been applicable during the time of national emergency. In this careful effort to repeal emergency legislation which was no longer needed Congress made no reference to the gold legislation and to the power given to the President by 12 U.S.C., Section 95a. Since Congress, having power to terminate this legislation and the power given thereunder to the President, did not see fit to do so, it is respectfully submitted that this Court should not judicially declare the executive order invalid. The President, having the power under 12 U.S.C., Section 95a to declare the emergency and to make regulations, is the only official in whom the power exists to terminate that emergency. He has not done so and this Court should be slow to do so.

The question of the validity of Executive Order 6260 is one which can and should be decided by this

Court as a matter of law. In *Hirabayashi v. United States*, 320 U.S. 81, the Supreme Court of the United States had no difficulty in taking judicial notice of the facts of the war emergency as sustaining the constitutionality of curfew regulations promulgated under the authority of an executive order during World War II.

In *State of California v. Anglim* (9th Cir. 1942), 129 F. 2d 455, this Court took judicial notice of factual conditions in the railroad industry in sustaining the constitutionality of the Carriers Taxing Act of 1937 as applied to state-operated railways.

More recently in *Dennis v. United States*, 341 U.S. 494, the United States Supreme Court held the Smith Act constitutional as against a contention that there was no showing of the requisite "clear and present danger" to justify the restrictions imposed by that act on free speech. The court stated at page 514:

"The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent. Bearing, as it does, the marks of a 'question of law,' *the issue is properly one for the judge to decide.* (Italics added.)

Surely if questions of the constitutionality of statutes based in part on factual considerations are decided by courts as matters of law, the question of the validity of Executive Order 6260 may be similarly decided by this Court.

C. IF FACTUAL EVIDENCE WAS NECESSARY TO A CONSIDERATION OF THE VALIDITY OF EXECUTIVE ORDER 6260, APPELLANT'S FAILURE TO OFFER EVIDENCE ON THAT ISSUE PRECLUDES FURTHER CONSIDERATION OF SUCH FACTUAL QUESTION.

While it may be seen from the above-cited cases that the Supreme Court has taken judicial notice of facts necessary to determine the constitutionality or validity of a challenged law (as we believe this Court should), nevertheless it may be conceded that there are many instances in the law where the factual considerations essential to a determination of the validity of a law are adduced from evidence taken at the trial of the proceeding in which the validity of the law is challenged. However, in such situations it has been decided that the burden is on the defendant who challenges the law to adduce those facts which he claims are fatal to its validity.

In *Whitney v. California*, 274 U.S. 357, the ap-

pellant challenged the validity of the California Criminal Syndicalism Law. In sustaining the validity of those statutes Justice Brandeis stated in his concurring opinion, at 379:

“Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed.”

If the burden was on the defendant in the *Whitney*

case to offer evidence as to facts which might invalidate the statute under which she was charged, so in the case at bar the burden was upon Harold G. Bauer to offer evidence in the trial court as to termination of the emergency. Appellant's failure to offer evidence of the absence of any emergency which could sustain the validity of Executive Order 6260 should foreclose further consideration of that factual question in this Court.

Other Federal cases holding that a defendant waives defensive matter by failure to properly offer evidence thereof in the trial court are:

Glasser v. United States, 315 U.S.60, 87.

The failure of the defendant who asserted that improper methods were used in selecting the jury panel to offer evidence of the claimed irregularities precluded him from raising the question in the appellate court.

Frazier v. United States, 335 U.S. 497.

The failure of the defendant to offer evidence that jurors were biased by reason of Government employment precluded his assertion on appeal that the trial court erred in failing to sustain his challenges to such jurors for cause.

Wright v. United States (C.A. - D.C. 1954), 215 F. 2d 498.

At the trial the defendant offered no expert evidence to sustain his defense of insanity. No issue of insanity was submitted to the jury. Subsequently, by motion for new trial the defendant sought to offer affidavits by psychiatrists on the issue. It was held that such affidavits were not "newly discovered evidence" and that the motion for a new trial was properly denied. The Court of Appeals for the District of Columbia in that case did not find it necessary to remand the case for a rehearing on the issue of defendant's insanity. By failure to present such evidence at the appropriate time the defendant had waived his right to urge the defense further.

In the case of *Chastleton Corp. v. Sinclair*, 264 U.S. 543, it is true that the Supreme Court remanded a case for trial to the district court on the existence of the requisite emergency. However, it must be remembered that the proceeding was a civil case wherein a motion to dismiss the complaint had been granted. In the complaint the plaintiff sought to enjoin the enforcement of a regulation on the ground that the emergency which was necessary to sustain it had terminated.

In these circumstances and after holding that the

complaint stated a cause of action it was of course appropriate to reverse and remand the case for a trial on the issue. No opportunity had been afforded to the party challenging the legislation to offer evidence which might have established the invalidity of the law. Such is not the situation here. After a full trial on the merits and after a verdict of guilty, appellant should not now be entitled to a further hearing on an issue as to which no evidence was offered. The appellant who had a full opportunity to present any factual matters which affected the validity of the challenged executive order did not do so. Under such circumstances the appellant should be held to have waived his right to any further hearing.

D. THE COURT SHOULD CLARIFY THE NATURE OF THE FURTHER PROCEEDINGS TO BE HAD IN THE COURT BELOW.

While not conceding that any further hearing is necessary or required in the court below, it is nevertheless respectfully suggested that if this Court chooses to adhere to its present Opinion there should be some direction to the trial judge as to the nature of the further hearing directed by this Court. It is difficult to ascertain from the Opinion of January 29, 1957, whether this Court has ruled that the consideration of factual evidence is necessary. If further

factual testimony is required by this Court's Opinion, is the appellant entitled to a jury trial? Or is the issue one which can be determined by the Court alone without the necessity of further impaneling a jury? On whom does the burden of proof rest at such further proceedings? Is a showing of the existence of a *war* emergency sufficient to sustain the order or is an *economic* emergency required?

It has of course been held that questions concerning the validity of a statute may be properly litigated in a non-jury proceeding and that the defendant may not thereafter, in a criminal trial for violation of the law, assert the invalidity of the Statute under which he is charged. *Yakus v. United States*, 321 U.S. 414. However, in the *Yakus* case and others like it the Congress had provided a statutory tribunal to determine the validity of the challenged regulation. No such tribunal exists in the case at bar. The difficulties inherent in the piecemeal trial of criminal cases are well set out in the dissenting opinion in the *Yakus* case. If this Court chooses to adhere to its present Opinion, it is respectfully requested that further consideration be given to the nature of the proceeding to be conducted in the District Court so that a further appeal after such further District Court proceedings will be less likely to be necessary.

III.

SUMMARY AND CONCLUSION

This Court can and should determine the validity of Executive Order 6260 as a matter of law. Even if the Court feels that the question is in part dependent upon factual considerations, the Court may take judicial notice of the necessary facts. Even if the Court should not choose to do so, the facts which the Court feels are necessary to a consideration of this question are defensive matters which defendant - appellant should have offered to prove during the course of the trial below. If after consideration of these questions this Court still feels that a further hearing of some type is required in the court below, it is respectfully requested that the Court delineate the nature of the hearing which is to take place.

Respectfully submitted,

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Charles P. Moriarty and William A. Helsell certify hereby that they are counsel for appellee herein; that appellee makes the foregoing petition for rehearing *en banc* in good faith and that in their judgment and in the judgment of each of them, the said petition is well founded and is not interposed for delay.

CHARLES P. MORIARTY

United States Attorney

WILLIAM A. HELSELL

Assistant United States Attorney

TOPICAL INDEX

	PAGE
Preliminary statement	1
Statement as to jurisdiction.....	1
Facts	2
Appellant's argument	7
Point I. Laurence Massa is not a proper cross-defendant.....	8
Point II. The first cause of action in the cross-complaint relating to an alleged patent infringement does not contain facts sufficient to constitute a cause of action.....	10
Point III. The judgment entered in favor of cross-complainant is void.....	14
Point IV. The judgment rendered in favor of the cross-complainant should be reversed.....	16

TABLE OF AUTHORITIES CITED

CASES	PAGE
Arlac v. Hat Corporation of America, 166 F. 2d 286.....	13
Associated Plastics v. Gits Molding, 182 F. 2d 1000.....	15
Baltimore & Ohio v. Chicago River, 170 F. 2d 654.....	8
Barbasol Co. v. Jacobs, 160 F. 2d 336.....	16
Bettis v. Patterson-Ballagh Corp., 16 Fed. Supp. 455.....	13
Brody v. Charles I. Hubbs & Co., 11 F. R. D. 337.....	9
Cummings v. Moore, 202 F. 2d 145.....	15
Girdlar v. E. I. Du Pont, 56 Fed. Supp. 871.....	13
Hook v. Hook & Ackerman, 187 F. 2d 52.....	8
Hopkins v. McClure, 148 F. 2d 67.....	2
Maurer, F. W., v. Andrews, 30 Fed. Supp. 637.....	12
McRanie v. Palmer, 2 F. R. D. 479.....	8
Miller v. Camerco, 11 F. R. D. 560.....	8
New Discoveries v. Wisconsin Alumni, 13 Fed. Supp. 596.....	12
Oliver United Filters v. Silver, 206 F. 2d 658.....	15
Patterson-Ballagh Corp. v. Moss, 201 F. 2d 403.....	15
Payne Furnace v. Williams Wallace, 117 F. 2d 823.....	15
Pomerontz v. Jean Vivedou, 65 Fed. Supp. 948.....	12
Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co., 151 F. 2d 91	15
Rolley Inc. v. Younghusband, 204 F. 2d 209.....	16
San Francisco Lodge v. Forestal, 58 Fed. Supp. 466.....	12
Savoia Film v. Van Guard Film, 10 F. R. D. 64.....	8
Taylor v. Brotherhood of Ry. etc., 106 Fed. Supp. 438.....	13
Thermo-Plastics v. International Corporation, 42 Fed. Supp. 408	10
Tremond v. Schering, 122 F. 2d 702.....	10, 12, 14
Tuthill v. Wilsey, 85 Fed. Supp. 586.....	12, 14
Zenith v. R. C. A., 78 Fed. Supp. 591.....	13

RULES	PAGE
Federal Rules of Civil Procedure, Rule 13	3, 6
Federal Rules of Civil Procedure, Rule 14.....	3, 4, 5
Federal Rules of Civil Procedure, Rule 14a.....	4
Federal Rules of Civil Procedure, Rule 19	3, 5, 6, 7
Federal Rules of Civil Procedure, Rule 19a.....	8, 9
Federal Rules of Civil Procedure, Rule 19b	8, 9
Federal Rules of Civil Procedure, Rule 33.....	14
Federal Rules of Civil Procedure, Rule 37d.....	14
Federal Rules of Civil Procedure, Rule 55.....	6
Federal Rules of Civil Procedure, Rule 55b(1).....	14
Federal Rules of Civil Procedure, Rule 55b(2).....	14, 16

STATUTE

United States Code, Title 28, Sec. 2201	2, 14
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No. 14935.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAURENCE MASSA,

Appellant,

vs.

JIFFY PRODUCTS Co., Inc.,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Preliminary Statement.

This is an appeal by the cross-defendant, Laurence Massa, from a judgment entered in favor of the cross-complainant, Jiffy Products Co., Inc. [Tr. of Rec. pp. 100-101].

Statement as to Jurisdiction.

This action was commenced by Jetco, Inc., a California corporation [Tr. of Rec. p. 3, Par. I] in the Superior Court of the State of California, in and for the County of Los Angeles [Tr. of Rec. p. 3]. The defendant and cross-complainant Jiffy Products Co., Inc., a Texas corporation [Compl. Par. II, Tr. of Rec. pp. 3-4], on the

basis of diversity of citizenship, transferred this matter to the Federal Court. On the 6th day of September, 1955, a default judgment was entered in favor of the cross-complainant, Jiffy Products Co., Inc., against Laurence Massa, the cross-defendant [Tr. of Rec. pp. 99-100]. Jurisdiction is claimed by the appellee under 28 U. S. C., Sec. 2201 [Tr. of Rec. p. 45].

An aggrieved party may prosecute a timely appeal from a default judgment. (*Hopkins v. McClure*, 148 F. 2d 67, 69.)

Facts.

In November of 1950, Jetco, Inc., a California corporation [Tr. of Rec. p. 3] commenced an action against Jiffy Products Co., Inc., and others for unfair competition, property damage and for an accounting [Tr. of Rec. pp. 3-10]. The complaint, simple in form, contained two causes of action. The first was for unfair competition [Tr. of Rec. pp. 3-7] and the second for violation of a trade mark allegedly owned by the plaintiff [Tr. of Rec. pp. 7-9]. The gravamen of both causes of action is that the plaintiff, a manufacturer of bucket teeth, used the name "Jiffy" on its products [Pars. VII and VIII of the Compl.; Tr. of Rec. pp. 5-6] and that the defendant, Jiffy Products Co., Inc., made the same type of teeth and also used the name "Jiffy" on its product [Par. VII of the Comp.; Tr. of Rec. p. 6]; that the defendant sold this product in the State of California and elsewhere, thereby competing unfairly with the plaintiff [Par. VIII of Compl.; Tr. of Rec. pp. 6-7].

Subsequently this cause was removed to the Federal Court, where the defendant made answer [Tr. of Rec. pp. 11-23] including a counterclaim [Tr. of Rec. pp. 23-36].

At a later time it developed that the plaintiff was neither the owner nor the assignee of the registered trade mark "Jiffy" and plaintiff thereupon withdrew its second cause of action based on trade mark infringement [Tr. of Rec. p. 93], so that all that now remains is a simple cause of action for unfair competition between Jetco, Inc., a California corporation, and Jiffy Products Co., Inc., a Texas corporation. An injunction *pendente lite* was granted by the Court, and the matter is now set for trial for October 2, 1956.

Laurence Massa, an individual, is ostensibly the owner of patent No. 2,319,464 [Tr. of Rec. pp. 45-46] and registered trade mark "Jiffy" bearing registration No. 528,058 [Tr. of Rec. p. 5].

In April of 1953, the defendant, Jiffy Products Co., Inc., moved the Court under Rules 13, 14 and 19 of the Federal Rules of Civil Procedure for the addition of Laurence Massa to the cause of action as a third party defendant [Tr. of Rec. p. 39]. The motion alleged that "Laurence Massa is a necessary party" [Tr. of Rec. p. 41, item 4], and on May 13, 1953, the Court entered an order "That Laurence Massa be made a third party defendant to this action" [Tr. of Rec. p. 44, item 1] (Rule 14, F. R. C. P.). A third party summons under Rule 14 of the F. R. C. P. was thereupon issued against Laurence Massa, third party defendant [Tr. of Rec. p. 66] and a

third party complaint filed [Tr. of Rec. pp. 44-65]. It should be particularly noted that the third party complaint was directed *only against Laurence Massa* [Tr. of Rec. p. 44; Par. II, Tr. of Rec. p. 45; Par. I, Tr. of Rec. p. 58]. No cause of action on the third party complaint was directed against the plaintiff, Jetco, Inc., and no relief was sought against the plaintiff, Jetco, Inc. [Tr. of Rec. pp. 64-65]. The third party complaint was thereupon served upon Laurence Massa thereby giving the court jurisdiction over his person as a third party defendant under Rule 14, F. R. C. P.

Upon being served with the summons and complaint, Laurence Massa as a third party defendant immediately moved to dismiss and strike the pleadings and the Order [Tr. of Rec. pp. 79-80]. The gravamen of the motion was in effect that the issuance of a third party summons and complaint under Rule 14, F. R. C. P. was void insofar as Laurence Massa was concerned; that Rule 14 is applicable only where the third party defendant would become liable to the defendant if in the event a judgment was rendered in favor of the plaintiff as against the defendant (28 U. S. C. A. Rule 14a); that the third party complaint showed no privity of liability from the third party defendant to the defendant; that even if the defendant obtained complete relief as against the third party defendant on the third party complaint as pleaded, it could in no way lessen, diminish or alter the defendant's liability to the plaintiff.

The force of Laurence Massa's motion, and the error of making him a third party defendant under Rule 14, was immediately discernible to the defendant [Tr. of Rec. p. 83, item 5] for it promptly moved the court for an order under Rule 19, F. R. C. P. to "reidentify" third party defendant Laurence Massa as a defendant [Tr. of Rec. pp. 81-84]. On the 30th day of September, 1953 the court entered an "Order Supplementing and Modifying Order of May 12th, 1953, filed May 13th, 1953" and altered the status of Laurence Massa from a third party defendant to a cross-defendant on the ground that Laurence Massa was an *indispensible* party to plaintiff's cause of action for trade mark infringement, patent infringement and trade mark cancellation [Tr. of Rec. pp. 94-95]. The court, therefore, although it obtained jurisdiction over Laurence Massa under Rule 14, F. R. C. P. [Tr. of Rec. p. 66] impropriated it under Rule 19, F. R. C. P., and the third party complaint metamorphosed into a cross-complaint.

Again it should be specifically noted that although Jurisdiction over Laurence Massa was desired on the grounds that he was a necessary and indispensable party to the plaintiff's cause of action against the defendant [Tr. of Rec. p. 83, item 4; p. 94, items 1 and 2] the cross-complaint is directed only against Laurence Massa, and the cross-complaint desired no relief whatsoever against plaintiff.

In April of 1954, the cross-defendant Massa moved to dismiss the cross-complaint on jurisdictional grounds and

on the further grounds that the cross-complaint was not within the meaning of either Rules 13 or 19 of F. R. C. P. [Tr. of Rec. pp. 96-97]. The motion was denied on the ground,

“ . . . that the presence of Laurence Massa in this case will eliminate piecemeal litigation in agreement with the purposes of the Federal Rules of Civil Procedure. . . .” (Italics added.) [Tr. of Rec. p. 98, item 1.]

On September 6, 1955, the cross-complainant obtained a default judgment against the cross-defendant Laurence Massa (without the plaintiff participating therein) granting it all the relief prayed for in its cross-complaint [Tr. of Rec. pp. 99-100]. The judgment as a matter of law (F. R. C. P., Rule 55) could not and did not settle any issues as between the plaintiff and the defendant, and the basis of making Laurence Massa a cross-defendant under Rule 19, F. R. C. P. on the grounds that he was a necessary and indispensable party to an adjudication of the rights between the plaintiff and the defendant is now established to be entirely fictitious. In any event piecemeal litigation is being furthered in contravention to the order of April 29, 1954 [Tr. of Rec. p. 98] for the issue between plaintiff and defendant still must be tried. Moreover, since plaintiff did not participate in the default judgment and was not a party thereto, the judgment of cross-complainant against Laurence Massa is not binding on the plaintiff.

APPELLANT'S ARGUMENT.

The argument of the cross-defendant, Laurence Massa, is simply this:

If John sues me in negligence, can I, in the same cause of action bring a cross-complaint against John's brother-in-law on a promissory note?

Rule 19 of the Federal Rules of Civil Procedure makes provisions that where issues are to be determined between litigants, the court may bring in as cross-defendants, all parties who are interested in the determination of these issues, so that piecemeal litigation may not be had if the court can make one brief determination. The guiding light is that all parties must have an interest in the determination of the same issue.

It must be emphasized that in this particular situation, although the defendant constantly iterated that Laurence Massa was a *necessary* and *indispensable* party to the issues between the plaintiff and the defendant, both its third party complaint and its cross-complaint were directed *only against Laurence Massa*. Nowhere, and never at any time, did the defendant seek any relief or adjudication against the plaintiff of those issues in which it sought judgment against Laurence Massa. The defendant desired relief against Laurence Massa, on issues which were entirely independent and alien to plaintiff's cause of action against defendant. Further evidence of this is that the cross-complainant was able to obtain his complete relief against the cross-defendant, without in any way disturbing plaintiff's cause against defendant and without plaintiff in any way participating therein [Tr. of Rec. pp. 99-100].

POINT I.

Laurence Massa Is Not a Proper Cross-Defendant.

Rule 19a, F. R. C. P. provides that:

“Persons having a *joint interest* shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant. . . .” (*Italics added.*)

This is the provision of the F. R. C. P. which provides for making party litigants indispensable parties.

An indispensable party, as set forth in Rule 19a is one whose interest in the subject matter of the suit and in the relief sought are so bound up that his legal presence as a party to the proceedings is absolutely necessary.

Hook v. Hook & Ackerman, 187 F. 2d 52;

Baltimore & Ohio v. Chicago River, 170 F. 2d 654, 658.

As the rule states, there must be a *joint interest* between the persons, and if the Court can proceed and do justice *without affecting such persons, they are not indispensable parties.*

McRanie v. Palmer, 2 F. R. D. 479.

Nor is Laurence Massa a necessary party to the proceedings as defined by Section 19b, F. R. C. P., for necessary parties are those whose presence are required to adjudicate the controversy.

Savoia Film v. Van Guard Film, 10 F. R. D. 64.

But in either event, whether indispensable party or necessary party, the test is whether the controversy arises out of the same transaction.

Miller v. Camerco, 11 F. R. D. 560.

Analyzing the pleadings in the case at bar, it is readily established that plaintiff's iniquities against the defendant are in no wise related to defendant's grievances against Laurence Massa. The cross-complaint contains three causes of action and *all of them are directed against Laurence Massa only*. Nowhere in the cross-complaint is any mention made, nor is any relief sought, against the plaintiff. The most favorable interpretation that can be given to the cross-complainant on its cross-complaint, is that it has a law suit against Laurence Massa, which is utterly foreign and alien to the law suit between the plaintiff and the defendant. The plaintiff's claim against the defendant is one for unfair competition; namely, that the defendant did compete unfairly with the plaintiff. The defendant's complaint against Laurence Massa as set forth in his cross-complaint deals with the adjudication of a patent which has nothing whatever to do with the plaintiff; and the question of ownership of a trade mark which again has nothing to do with the plaintiff. It is obvious, therefore, that Laurence Massa is neither an indispensable nor a necessary party to adjudicate the rights between the plaintiff and the defendant for unfair competition under Rule 19a which permits joinder of parties who have a *joint interest* or under 19b which permits a joinder of parties required to a complete determination of the issues involved.

The case of *Brody v. Charles I. Hubbs & Co.*, 11 F. R. D. 337, is precisely in point. In that case the plaintiff commenced a proceeding for unfair competition and trade mark infringement. In that case the plaintiff was a licensee under a patent and trade mark from Cellojac. Judge Kaufman (p. 338) held that since the complaint was a simple and singular cause of action for unfair com-

petition based on a simulation of plaintiff's product and misrepresentation by the defendants, and there was no claim made by the plaintiff for patent infringement, the patent owner Cellojac was neither an indispensable nor even a necessary party to the action.

Undoubtedly the entire controversy between plaintiff, Jetco, Inc., and defendant, Jiffy Products Co., Inc., could be determined without the presence of Laurence Massa.

POINT II.

The First Cause of Action in the Cross-Complaint Relating to an Alleged Patent Infringement Does Not Contain Facts Sufficient to Constitute a Cause of Action.

The first cause of action of the cross-complaint [Tr. of Rec. pp. 45-51] does not state a claim. An action for declaratory relief to have a patent declared invalid must allege that the pleader is an infringer of the patent and that the patentee is threatening the pleader with an infringement of the patent. (*Tremond v. Schering*, 122 F. 2d 702.) Such allegations to create a justiciable controversy are necessary to state a cause of action in declaratory relief. The first cause of action of the cross-complaint [Tr. of Rec. pp. 45-51] contains neither.

This rule of law is fully set forth in the case of *Thermo-Plastics v. International Corporation*, 42 Fed. Supp. 408, 410, where the court granted summary judgment and dismissed plaintiff's petition saying as follows:

“Certainly no holder of a patent should be put to the expense of defending a suit by another person or sundry persons under the Declaratory Judgment Act, 28 U. S. C. §400, unless that person or persons is or may be damaged by affirmative acts of the

patent holder. A holder of a patent has a right to investigate or inquire with relation to other devices of a nature similar to those he will or is manufacturing, and such investigation or inquiry does not seem to be improper nor does it contain a threat of infringement. The answering affidavit of Mr. Scowe states that he cannot recall what was said, but he had an 'understanding' and from the conversation he 'understood.' Nothing in Mr. Scowe's affidavit is of testimonial value. *It is apparent that an effort is being made to call the defendant into court without proper proof of a statement amounting to a charge of infringement* (italics ours).

"In the case of *Treemand Co. v. Schering Corp.*, 3rd Cir., 122 F. 2d 702, *supra*, Judge Clark, quoting from Borchard Declaratory Judgments, 2d Ed., 1941, 807, said: 'And yet, it seems best to limit declaratory relief for the infringer to cases in which an adversary claim has been made against him, though it may, it is believed, apply to an article not yet manufactured but only about to be manufactured. This requirement, present in practically all the adjudicated cases, refute the fear that patentees might be harassed by prospective infringers and would be obliged continually to defend their patents. The fact that a patentee's claim of infringement is a condition precedent to this type of action places the matter of adjudication of the patent within the control of the patentee, for, if he wishes to avoid adjudication he can refrain from making charges of patent infringement.' "

It is likewise quite settled that for the infringer to maintain an action for declaratory relief the threat of infringement must be quite definite and certain and not merely nebulous. An anticipation as to a future course of events is, of course, not a justiciable controversy (*San*

Francisco Lodge v. Forestal, 58 Fed. Supp. 466) and in *F. W. Maurer v. Andrews*, 30 Fed. Supp. 637, 638, it was held that an actual controversy under the Declaratory Judgments Act cannot be created by taking a position and then challenging the opposing side to dispute it.

There must be more than a mere *possibility* of a dispute. The infringer must be charged to infringe or helping others to infringe. (*Tuthill v. Wilsey*, 85 Fed. Supp. 586, 589.) In this case the plaintiff in an action for declaratory relief to declare a patent void contended that in a suit brought in the State Court the defendant alleged that pumps made by the plaintiff were covered by the defendant's patent. The court held that this was an insufficient charge of infringement and created no justiciable issue.

In *Pomerontz v. Jean Vivedou*, 65 Fed. Supp. 948, the defendants wrote a letter regarding the infringement of its patents. Plaintiff thereupon brought an action for declaratory relief. Held the letter did not show a controversy over this *particular* patent and the Court thereupon dismissed the cause, further stating that the purpose of the suit was to "fish" for other patents infringed by the plaintiff.

In *New Discoveries v. Wisconsin Alumni*, 13 Fed. Supp. 596, a complaint was dismissed for failing to allege that the plaintiff was using defendant's products or infringing the defendant's products, the court further holding that a notice of infringement does not give rise to an actual controversy. In this connection it should be further stated that this case, although not overruled, did not meet the formal approval of the court in the case of *Treemond v. Schering*, heretofore quoted.

And Judge Yankwich in *Bettis v. Patterson-Ballagh Corp.*, 16 Fed. Supp. 455, in holding that you cannot litigate an apprehended claim but only an actual one, said on pages 461-462 that:

“A person merely apprehending or fearing the assertion of rights against him by another cannot bring him into court and compel him to litigate.”

Only when the patent owner makes his position clear with respect to a manufacturer's customers and the manufacturer finds his position affected by such assertion may the manufacturer then bring an action for declaratory relief. (*Arlac v. Hat Corporation of America*, 166 F. 2d 286, 293; *Girdlar v. E. I. Du Pont*, 56 Fed. Supp. 871, 875; *Zenith v. R. C. A.*, 78 Fed. Supp. 591, 594.)

This principle was clearly enunciated in *Taylor v. Brotherhood of Ry. etc.*, 106 Fed. Supp. 438, where the court said on page 442:

“A party seeking declaratory relief must be confronted by a presently existing danger to establish legal rights, not a contingent, potential or possible liability (citing cases). It is settled in this jurisdiction and elsewhere that claims based merely upon assumed potential invasions of rights are not enough to warrant judicial determination by way of declaratory judgment or otherwise (citing cases).”

Paragraph V of the cross-complaint alleges [Tr. of Rec. p. 46]:

“At a time within the last six years, third party defendant stated to a customer of this third party plaintiff that excavating teeth made by this third party plaintiff comprised an infringement of said Letters Patent.”

It is respectfully submitted that under the authorities this vague and hazy allegation is insufficient to create a justiciable issue.

To make the cross-complaint sufficient to present a controversy under the patent laws, it must allege an actual charge of infringement. (28 U. S. C. A., Sec. 2201; *Tremond v. Schering Corp.*, 122 F. 2d 702, 705; *Tuthill v. Wilsey*, 182 F. 2d 1006, 1008.)

POINT III.

The Judgment Entered in Favor of Cross-Complainant Is Void.

Rule 37d, F. R. C. P., permits the Court, on proper notice, to strike out a pleading and enter a judgment by default against the party, should he fail to serve answers to interrogatories submitted under Rule 33. Entry of a default judgment is accomplished pursuant to Rule 55, F. R. C. P. Under subdivision b(1) of that rule, the Clerk of the Court may enter such judgment if it is for a sum certain or for a sum that can by computation be made certain. In all other cases the party entitled to a judgment by default must apply to the Court after serving written notice of the application at least three days prior to the hearing thereof and the Court may conduct such hearings and order such references as may be necessary to establish the truth of any averment by evidence. (Rule 55b, (2) F. R. C. P.) In the case at bar the judgment was void for failing to establish any evidence as to the truth of any of the averments in the cross-complaint.

Bearing in mind that the cross-complaint is for the purpose of declaring a patent invalid [Tr. of Rec. pp. 45-51] and to determine the title to a registered trade

mark [Tr. of Rec. pp. 51-65], there should be some evidence to establish the cross-complainant's claim.

It is Hornbook law that a patent is entitled to the presumption of validity. (*Payne Furnace v. Williams Wallace* (9th Cir.), 117 F. 2d 823, 826; *Associated Plastics v. Gits Molding*, 182 F. 2d 1000, 1006.) Where the patent is regularly issued, it and all claims are presumptively valid and the burden of establishing invalidity is on those opposing it (*Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.* (9th Cir.), 151 F. 2d 91, 94), and such presumption is overcome only by clear and convincing evidence. The proof must be more than a dubious preponderance; it must be strong, clear and convincing. (*Oliver United Filters v. Silver*, 206 F. 2d 658, 664.)

In *Patterson-Ballough Corp. v. Moss* (9th Cir.), 201 F. 2d 403, this Court on page 406 said as follows:

“Appellants have the burden of proof on the question of the validity of the Moss patent since a presumption of validity arises from the issuance of the patent (citing cases). Reasonable doubts must be resolved in favor of the validity of the patent. The presumption created by the action of the patent office is the result of the expertness of an administrative body acting within its specific field and can be overcome only by clear, convincing proof.”

In *Cummings v. Moore*, 202 F. 2d 145, the court on page 148 said:

“The grant of letters patent raised a *prima facie* presumption that defendant was the inventor of the brush and the burden rested upon plaintiff to show otherwise by evidence which was clear, strong and convincing.”

The same rule applies to the registration of trade marks, this court holding in *Rolley Inc. v. Younghusband*, 204 F. 2d 209, 211, that the registration of a trade mark creates a rebuttable presumption of validity which must be overcome by the person challenging it.

In *Barbasol Co. v. Jacobs*, 160 F. 2d 336, the court on page 338 said:

“On the question of the validity of the trade mark, we start with the recognized rule that the registration of a trade mark raised a strong presumption of its validity (citing cases).”

The mere fact that the cross-defendant is present in court without the benefit of an answer to the cross-complaint does not entitle the cross-complainant to its relief without adducing proper evidence to support its position. (Rule 55b(2), F. R. C. P.) The cross-defendant, Laurence Massa, is still entitled to those presumptions given to him by law; and it was therefore incumbent for the cross-complainant to sustain its allegations in the cross-complaint by clear and convincing proof. Its failure to do so renders the judgment [Tr. of Rec. pp. 99-100] entered in behalf of the cross-complainant null and void.

POINT IV.

The Judgment Rendered in Favor of the Cross-Complainant Should Be Reversed.

Respectfully submitted,

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No. 14935

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAURENCE MASSA,

Appellant,

vs.

JEFFY PRODUCTS Co., Inc.,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

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TOPICAL INDEX

	PAGE
Preliminary statement	1
Statement as to jurisdiction.....	2
Statement of case.....	3
The facts	3
Appellee's argument	9
The reason for the cross-complaint.....	9
Point I. Laurence Massa is a proper cross-defendant.....	10
Point II. The first cause of action in the cross-complaint properly sets forth a claim in which the cross-complainant seeks declaratory relief with respect to patent infringe- ment	13
Point III. The judgment entered in favor of cross-complain- ant is valid.....	19
Conclusion	22

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alamo Refining Company v. Shell Development Company, et al., 99 Fed. Supp. 790, 90 U. S. P. Q. 326.....	12
Bach v. Quigan v. Traubner, 9 F. R. S. 13e.4, Case 1, 5 F. R. D. 34	14
Bettis v. Patterson-Ballagh Corp., 16 Fed. Supp. 455, 31 U. S. P. Q. 73.....	18, 19
Brody v. Charles I. Hubbs & Co., 11 F. R. D. 337.....	11
Calabrese v. Chiumento, 8 F. R. S. 8a.25, Case 1, 3 F. R. D. 435	14
Dennis v. Village of Tonka Bay, 151 F. 2d 411, 9 F. R. S. 8a.25, Case 5.....	14
Dioguardi v. Durning, 139 F. 2d 774, 7 F. R. S. 8a.25, Case 7.....	14
Fluorescent Fabrics, Inc. v. Gantner & Mattern Company, et al., 86 U. S. P. Q. 67.....	12, 16, 18
Klages v. Cohen, 9 F. R. S. 8a.25, Case 4.....	14
New Discoveries v. Wisconsin Alumni, 13 Fed. Supp. 596.....	18
Northwestern Yeast Co. v. Broutin, 133 F. 2d 628.....	21
Stauffer et al. v. Exley, 184 F. 2d 962, 87 U. S. P. Q. 40.....	2
Technical Tape Corporation v. Minn. Mining & Mfg. Co., 135 Fed. Supp. 505, 108 U. S. P. Q. 114.....	12
Tremond v. Schering, 122 F. 2d 702, 50 U. S. P. Q. 593.....	16, 18, 19
United States v. Borchers, 163 F. 2d 347, cert. den. 68 S. C. 108, 332 U. S. 811, 92 L. Ed. 389.....	21
Waterman v. Mackenzie, 138 U. S. 252.....	12

RULES

Federal Rules of Civil Procedure, Rule 8.....	13
Federal Rules of Civil Procedure, Rule 8(a).....	13
Federal Rules of Civil Procedure, Rule 19.....	3
Federal Rules of Civil Procedure, Rule 19(a).....	10, 12
Federal Rules of Civil Procedure, Rule 19(b).....	10

	PAGE
Federal Rules of Civil Procedure, Rule 20.....	3
Federal Rules of Civil Procedure, Rule 20(a).....	10
Federal Rules of Civil Procedure, Rule 25.....	13
Federal Rules of Civil Procedure, Rule 55(b)(2).....	20

STATUTES

Code of Civil Procedure, Sec. 426.....	13
Trade-mark Act of 1946, Pub. Law 489, 79th Cong., 2d Sess., Chap. 540, Title VI, Secs. 37-39.....	2, 3
United States Code, Title 15, Secs. 1119-1121.....	2, 3
United States Code, Title 28, Sec. 2201.....	3
United States Code, Title 35, Sec. 281.....	3

TEXTBOOKS

3 Barron & Holtzoff, Federal Practice and Procedure, p. 50.....	21
2 Moore's Federal Practice, p. 1648.....	13

No. 14935
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LAURENCE MASSA,

Appellant,

vs.

JIFFY PRODUCTS CO., INC.,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

Preliminary Statement.

The appellant Laurence Massa has appealed from a default judgment entered against him in favor of appellee—cross-complainant Jiffy Products Co., Inc. [R. 100, 101.] No motion to vacate the default nor to set aside the default judgment was made by the appellant. The plaintiff Jetco, Inc., not a party to this appeal, did file a motion to vacate and set aside the default judgment.

The appellee-defendant Jiffy Products Co., Inc., filed its counterclaim against the plaintiff Jetco, Inc., seeking declaratory relief with respect to patent infringement and to have the trade-mark registration relating to the trade-mark “Jiffy” canceled in the Patent Office. It was necessary to bring in the appellant-cross-defendant Laurence Massa because of the contradictory allegations under oath of the appellant Laurence Massa in the verified pleadings and in his deposition concerning the ownership of the patent and of the trade-mark.

Statement as to Jurisdiction.

The complaint was filed by the plaintiff Jetco, Inc., in the Superior Court of the State of California, in and for the County of Los Angeles [R. 3-10], and was transferred to the United States District Court. The first count was for unfair competition and the second count was for the infringement of Trade-mark Registration No. 528,058 directed to the trade-mark "Jiffy." The District Court had jurisdiction under the Trade-mark Act of 1946, Public Law 489, 79th Congress, Chapter 540, Second Session, Secs. 37, 38, and 39 of Title VI (15 U. S. C. 1119, 1120, and 1121). It was also alleged that the District Court had jurisdiction by virtue of the fact that the defendant and cross-complainant Jiffy Products Co., Inc., was a Texas corporation. Jurisdiction also resided in the District Court under the doctrine of this Court as laid down in *Stauffer et al. v. Exley* (C. C. A. 9, 1950), 184 F. 2d 962, 87 U. S. P. Q. 40, both parties being engaged in interstate commerce.

In the United States District Court, the defendant Jiffy Products Co., Inc., appellee here, filed a counterclaim [R. 23-36], the first cause of action of which [R. 23-30] sought declaratory relief with respect to its alleged infringement of the patent 2,319,464 then believed and admitted to be owned by the plaintiff Jetco, Inc., and which covered the digging tooth forming the subject matter of the unfair competition and trade-mark counts of the complaint. The second cause of action of the counterclaim sought to have Trade-mark Registration 528,058, then believed and admitted to be owned by the plaintiff Jetco, Inc., canceled by the Commissioner of Patents.

The District Court had jurisdiction of the action for declaratory relief with respect to patent infringement

under the patent laws of the United States, Title 35, U. S. C., Sec. 281. Being a declaratory relief action, jurisdiction also depended upon 28 U. S. C., Sec. 2201. The jurisdiction of the District Court as to the second count depended upon the Trade-mark Act of 1946, Public Law 489, 79th Congress, Chapter 540, Second Session, and in particular upon Sections 37, 38 and 39 of Title VI of said Act (15 U. S. C. 1119, 1120 and 1121).

Counts one and two of the cross-complaint against the appellant here are substantially identical in subject matter to counts one and two of the counterclaim and the District Court had jurisdiction of the subject matter under the same provisions of the law. The District Court had jurisdiction of the cross-defendant Laurence Massa, the appellant here, under the provisions of Federal Rules of Civil Procedure, Rules 19 and 20.

The jurisdiction of this Court resides by reason of the fact that an appeal has been taken from the default judgment by the cross-defendant Massa [R. 100].

This is the third time this case has been before this Court. The other appeals brought by the plaintiff Jetco, Inc., of which Mr. Massa, the appellant here, was president, were summarily dismissed upon motion.

Statement of Case.

The Facts.

The original complaint [R. 3-10] filed by the plaintiff Jetco, Inc., against the defendants, including the appellee Jiffy Products Co., Inc., contained two causes of action. The first cause [R. 3-7] sounded in unfair competition based upon the alleged use by appellee of the trade-mark "Jiffy" alleged to be the property of the plain-

tiff by assignment from Laurence Massa. The second cause of action [R. 7-10] sounded in trade-mark infringement based upon the alleged infringement by appellee, and the other defendants, of United States Trade-mark Registration 528,058 covering the trade-mark "Jiffy" alleged to be the property of the plaintiff by assignment from Laurence Massa. It was alleged that the defendant appellee Jiffy Products Co., Inc., and the other defendants selling its products, had applied that trade-mark to digging teeth adapted to be used in connection with trenchers, draglines, shovels, buckets, etc.

Upon the action being transferred to the United States District Court, the defendants, including the appellee Jiffy Products, Co., Inc., answered the complaint [R. 11-23] and appellee also filed a counterclaim [R. 23-36] against the plaintiff Jetco, Inc.

The first cause of action of the counterclaim sought declaratory relief relative to patent infringement and related to United States Letters Patent 2,319,464 directed to the same digging tooth to which the trade-mark "Jiffy" was applied. The patent was alleged to be the property of the plaintiff Jetco, Inc., by virtue of an assignment from Laurence Massa [R. 24, par. 5], and the plaintiff Jetco, Inc., had alleged infringement by the defendant-counterclaimant Jiffy Products Co., Inc. [R. 24, par. 5]. The second cause of action in the counterclaim sought the judgment of the Court that Trade-mark Registration 528,058 directed to the trade-mark "Jiffy," alleged to be assigned by Laurence Massa to the plaintiff Jetco, Inc., should be canceled by the Commissioner of Patents and a new registration issued to show the rights of the defendant-counterclaimant Jiffy Products Co., Inc., therein

[R. 30-34]. The third cause of action sought damages from the plaintiff Jetco, Inc., for its violations of the rights of the defendant Jiffy Products Co., Inc., in the trade-mark "Jiffy" [R. 34, 35].

The answer of the plaintiff Jetco, Inc., to the counterclaim admitted that United States Letters Patent 2,319,464 was its property [R. 37, par. III], and admitted ownership of Trade-mark Registration 528,058 through failure to deny [R. 37, 38, pars. IV-VII], a position consistent with paragraph III of the second cause of action of the complaint itself [R. 8] which alleged:

"That on or about the 2nd day of January, 1950, the said Laurence Massa did assign all his right, title and interest in and to said trade-mark 'Jiffy' to the plaintiff herein and the said plaintiff herein ever since that time has been and now still is the owner of the trade-mark 'Jiffy.' "

The answer to the third count of the counterclaim [R. 38, 39] denied counterclaimant's right to damages for violation of its rights in the trade-mark "Jiffy."

Plaintiff's complaint was verified by its president Laurence Massa, the appellant here.

On November 24, 1952, the deposition of the appellant Laurence Massa was taken [R. 67-69] and confusion developed concerning the ownership of the patent 2,319,464, of the trade-mark "Jiffy," and of the Trade-mark Registration 528,058. Mr. Massa under oath testified in diametric opposition to the verified statement of the complaint concerning the ownership of the trade-mark and its registration [R. 5, par. VIII] and to the statement of the plaintiff's answer to the counterclaim admitting owner-

ship of Letters Patent 2,319,464 [R. 37, par. III]. In his deposition Mr. Massa stated under oath [R. 67-69]:

“A. . . . I have been the owner (of patent 2,319,464) ever since it was issued, the owner ever since the beginning . . .

* * * * *

“A. I haven’t conveyed title to anybody, no, sir. . . . It is my property.” [R. 67.]

* * * * *

“Q. Did you ever assign the trade-mark ‘Jiffy’ to Jiffy Excavator Tool Company (earlier name of plaintiff Jetco, Inc.)? A. No, to nobody.

* * * * *

“Q. You are still the owner of the trade-mark ‘Jiffy?’ A. Yes.

* * * * *

“Q. And now, as president of Jetco, Inc., is it your position that Jetco, Inc., has exclusive right to use the name ‘Jiffy’ for Jiffy digging teeth, or points for use with excavators? A. Well, now, Mr. Fairfield, should I answer? Now, listen to this, here is the point. I licensed them. You may call it assigned, or give title, but I didn’t give the title. I just licensed them . . .

* * * * *

“Q. Then you are the owner? A. I am the owner. Sure. I am.” [R. 68, 69.] (Parenthetical matter inserted.)

The defendant-counterclaimant-appellee Jiffy Products Co., Inc., simply could not be certain who owned the patent or the trade-mark. There were diametrically opposed allegations under oath in the complaint and in the deposition. That the confusion produced by the divergent

allegations to ownership will be clearly before the Court, the following is called to attention:

- (a) Trade-mark "Jiffy" alleged to be owned by plaintiff Jetco, Inc., in verified complaint at count one, paragraph VIII [R. 5].
- (b) Laurence Massa, who verified the complaint, stated under oath that he individually owned the trade-mark [R. 68, 69].
- (c) Registration of trade-mark "Jiffy" alleged to be owned by plaintiff Jetco, Inc., in verified complaint at count two, paragraph III [R. 8].
- (d) Laurence Massa stated under oath in his deposition that he personally owned the mark [R. 68, 69].
- (e) Ownership of Massa patent 2,319,464 alleged to be in Jetco, Inc., in complaint of infringement action brought in the same District Court where it is identified as No. 14298-WM, during pendency of the present suit [R. 71-73, particularly par. VI].
- (f) Patent 2,319,464 admitted to be the property of the plaintiff Jetco, Inc., in its answer to the counterclaim [R. 37, par. III].
- (g) Laurence Massa, the president of Jetco, Inc., stated under oath in his deposition in this case that he personally owned patent 2,319,464 [R. 67, 68].

In order to make certain that the proper parties would be before the Court, the defendant-counterclaimant sought permission from the Court to bring in Laurence Massa as a party defendant [R. 39-42] and the Court granted its order adding Mr. Massa as a third party defendant [R. 43, 44]. After Mr. Massa was before the Court, it seemed that he more properly should be identified as a

cross-defendant rather than as a third party defendant although the matter was not entirely clear, for possibly Mr. Massa as licensor of the plaintiff as to the patent and the trade-mark could stand in the position of a third party defendant. Upon the motion of the defendant Jiffy Products Co., Inc. [R. 80-84], the Court consented to the identification of Laurence Massa as a cross-defendant and the re-identification of the third party complaint against him as a cross-complaint [R. 94, 95].

The cross-complaint against the cross-defendant—appellant Laurence Massa [F. 44-66] in its first cause of action was substantially identical to the first cause of action of the counterclaim but named Laurence Massa as the owner of the patent [R. 45, par. V]. The second cause of action was basically the same as the second cause of action of the counterclaim and sought to have Trade-mark Registration 528,058 canceled by the Commissioner of Patents. It was just as important to have the proper owner of the trade-mark registration before the Court as it was the proper owner of the patent and it apparently was either Jetco, Inc., or Laurence Massa, depending upon which statement one elected to accept.

The appellant Laurence Massa answered the cross-complaint but later failed and refused to answer interrogatories as ordered by the Court. His answer was stricken and judgment was entered for the appellee [R. 99, 100]. No motion to vacate the default was filed and no motion to set aside the default judgment was made on behalf of the appellant.

APPELLEE'S ARGUMENT.

The Reason for the Cross-Complaint.

Appellee had only one reason for filing a cross-complaint against the cross-defendant—appellant Laurence Massa. That reason comprised the fact that it could not determine whether appellant Laurence Massa or the plaintiff Jetco, Inc., owned the patent 2,319,464 and the trade-mark registration relating to “Jiffy” which were properly made counts one and two of the counterclaim. If piecemeal litigation were to be avoided with certainty it was necessary to bring both these parties into the action relating to the patent and to the trade-mark so that the adjudication of the rights of the parties would be effective and conclusive.

The appellant in his argument on page 7 says that the “guiding light is that all parties must have an interest in the determination of the same issue.” In view of the confusion which the appellant created as to ownership rights it would appear that he was in no position to complain if the appellee chose to protect itself and brought before the Court the various parties he personally had sworn held ownership rights, and therefore “interests,” in the subject matter involved. He created the confusion but seeks to avoid its logical results.

The plaintiff Jetco, Inc., did finally amend its answer to the counterclaim and did withdraw its second cause of action in its complaint sounding in trade-mark infringement, but those steps in no way altered the fact that the two counts of the counterclaim relating to the patent and to the trade-mark remained and remain pending and unsettled as of this time. The first and second counts of the counterclaim and the first and second counts of the cross-complaint are directed to the same issues.

POINT I.

Laurence Massa Is a Proper Cross-Defendant.

Appellant under Point I argued that Laurence Massa is not a proper cross-defendant because he does not have a “joint interest” with the plaintiff Jetco, Inc., and in this connection cites Federal Rules of Civil Procedure, Rule 19(a).

The appellant, however, does not call attention to Federal Rules of Civil Procedure, Rule 19(b) which reads in part as follows:

“When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action.”

The appellant also fails to call attention to Federal Rules of Civil Procedure, Rule 20(a) which reads as follows:

“All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise

in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.”

The lower court believed that the appellant Laurence Massa should be brought into the case, for it was undetermined and uncertain where the title to the patent and to the trade-mark registration actually resided. Under the provisions of the above rules the Court did not abuse its discretion in so determining and its order [R. 43, 44] was proper.

The appellant cites the case of *Brody v. Charles I. Hubbs & Co.*, 11 F. R. D. 337, as being “precisely in point.” A reading of the case indicates that the case is substantially without relevancy. In that case the first cause of action sounded in trade-mark infringement and the second cause of action in unfair competition. The fact that the plaintiff was a licensee under a patent was referred to in the second cause of action. The plaintiff was the owner of the trade-mark. The Court held that the second cause of action was in fact for unfair competition, struck out all reference to patent infringement, and held that the patent owner was not an indispensable party or even a necessary party.

In the present case the question of patent infringement is present. The question of trade-mark infringement and cancellation are present. The ownership of the patent and the trade-mark are both in doubt and resides

either in the plaintiff Jetco, Inc., or the cross-defendant Laurence Massa. Federal Rules of Civil Procedure, Rule 20(a) clearly provides that in such a case in which the relief sought may be "in the alternative" the party Laurence Massa could be brought before the Court.

Additionally, if the appellant Massa owns the patent and the plaintiff Jetco, Inc., is merely his licensee, as appellant testified [R. 67], it is proper to bring in Massa as holder of the title to the patent under the provisions of Federal Rules of Civil Procedure, Rule 19(a). Under the decisions the presence of Mr. Massa, as title holder of the patent of which the plaintiff—counter-defendant Jetco, Inc., was the licensee, was essential. Judge Mathes said in *Fluorescent Fabrics, Inc. v. Gantner & Mattern Company, et al.* (D. C., S. D., Cal., 1950), 86 U. S. P. Q. 67:

" . . . a patent owner retaining under an exclusive license control of actions to protect the patent from infringement is an indispensable party to an action against the licensee by an alleged infringer seeking a judgment declaring the patent invalid and not infringed."

See also, in this connection:

Waterman v. Mackenzie, 138 U. S. 252;

Technical Tape Corporation v. Minn. Mining & Mfg. Co. (1955), D. C., S. D., N. Y., Circuit Judge Lombard, 135 Fed. Supp. 505, 108 U. S. P. Q. 114;

Alamo Refining Company v. Shell Development Company, et al. (D. C., S. D., Del., 1951), Chief Judge Leahy, 99 Fed. Supp. 790, 90 U. S. P. Q. 326.

POINT II.

The First Cause of Action in the Cross-Complaint Properly Sets Forth a Claim in Which the Cross-Complainant Seeks Declaratory Relief With Respect to Patent Infringement.

Under the Federal Rules of Civil Procedure, there is no requirement that a cause of action set forth facts "sufficient to constitute a cause of action." Instead today it is only necessary that a claim be asserted.

Federal Rules of Civil Procedure, Rule 8(a) provides in part:

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . ."

Old equity Rule 25 required

"a short and simple statement of the ultimate facts upon which the plaintiff asked relief, omitting any mere statement of evidence."

That requirement was consistent with the rules of pleading in many states. The California Code of Civil Procedure, Section 426, requires a "statement of the facts."

Federal Rule 8, however, contains no such requirement and it is not necessary to plead facts sufficient to constitute a cause of action in setting forth a claim.

Moore's Federal Practice at page 1648, Volume 2, clearly states:

"There is no requirement that the pleading state 'facts,' or 'ultimate facts,' or 'facts sufficient to constitute a cause of action.'"

and cites numerous decisions supporting this statement which is now recognized and generally accepted by pleaders in the Federal Court. Decisions supporting this statement are the following:

Clark, C. J., in *Dioguardi v. Durning* (C. C. A. 2d, 1944), 139 F. 2d 774, 7 F. R. Serv. 8a.25, Case 7, followed in *Calabrese v. Chiumento* (D. N. J. 1944), 8 F. R. Serv. 8a.25, Case 1, 3 F. R. D. 435; *Klages v. Cohen* (E. D., N. Y., 1945), 9 F. R. Serv. 8a.25, Case 4; *Bach v. Quigan v. Traubner* (E. D., N. Y., 1945), 9 F. R. Serv. 13e.4, Case 1, 5 F. R. D. 34; *Dennis v. Village of Tonka Bay* (C. C. A. 8th, 1945), 151 F. 2d 411, 9 F. R. Serv. 8a.25, Case 5.

Under his Point II at page 10 in the first paragraph, the appellant makes the novel contention that in order to be entitled to declaratory relief with respect to patent infringement there must be an allegation "that the pleader is an infringer of the patent." Very obviously this would not be desirable where the party seeking declaratory relief seeks to have the court hold that it is not an infringer and/or that the patent is invalid.

In the cross-complaint [R. 44-65] the first cause of action alleges at paragraph II [R. 45] that:

" . . . there is an actual controversy now existing between third party plaintiff (cross-complainant) and third party defendant (cross-defendant) with respect to which the third party plaintiff (cross-complainant) needs a declaration of its rights by this Court."

Paragraph IV recites:

"Third party plaintiff (cross-complainant) brings this third party complaint (cross-complaint) on its

own behalf, it having been charged by the third party defendant (cross-defendant) with infringement of a patent, as hereinafter more fully appears.” [R. 45.]

Paragraph V of the cross-complaint [R. 45, 46] recites in part:

“ . . . At a time within the last six years, third party defendant (cross-defendant) stated to a customer of this third party plaintiff (cross-complainant) that excavating teeth made by this third party plaintiff (cross-complainant) comprised an infringement of said Letters Patent.” [R. 46.]

Paragraph VI of the cross-complaint [R. 46] clearly recites the controversy and in the following words:

“Third party plaintiff (cross-complainant) believes and therefore avers that it has not infringed and does not infringe Letters Patent No. 2,319,464 or any claim thereof, while third party defendant (cross-defendant) contends and alleges that third party plaintiff (cross-complainant) does infringe said patent by its manufacture and sale of excavating teeth.”

Paragraph VIII of the cross-complaint [R. 50] reads in part as follows:

“Third party plaintiff (cross-complainant) believes and therefore avers that it has not infringed and is not infringing said Letters Patent 2,319,464 upon the grounds:

(a) That the construction which it makes and sells does not fall within the purview of the claims of said patent.”

It is believed that the foregoing quoted portions of the cross-complaint clearly set forth a controversy between the

cross-complainant and the cross-defendant constituting a justiciable claim under the Federal Rules of Civil Procedure.

In *Fluorescent Fabrics, Inc. v. Gantner & Mattern Company, et al.* (D. C., S. D., Cal., 1950), 86 U. S. P. Q. 67, Judge Mathes said:

“ . . . in an action brought by an alleged infringer of a patent for a declaration of invalidity and non-infringement of the patent, and for injunctive and monetary relief from unfair competition, an ‘actual controversy’ is presented if the patent owner has made statements to the trade that his patent is being infringed by a line of goods whether or not the identity of the alleged infringer is known when the statements are made [28 U. S. C., Sec. 2201; *Dewey & Almy Chemical Co. v. American Anode, Inc.*, 137 F. 2d 68 [58 U. S. P. Q. 456] (3d Cir., 1943), cert. den. 320 U. S. 761 [59 U. S. P. Q. 495] (1943); *Treemond v. Schering Corp.*, 122 F. 2d 702 [50 U. S. P. Q. 593] (3d Cir., 1941)]; . . . ”

In support of his Point II the appellant relies upon the decision *Treemond v. Schering* (C. C. A. 3rd, 1941), 122 F. 2d 702, 50 U. S. P. Q. 593. Appellee is entirely content to accept the rule of that case. The Court's close consideration is respectfully requested.

As appellee reads the *Treemond v. Schering* case, the Court of Appeals held diametrically opposite to that which the appellant contends it held. In that case according to the Court of Appeals:

“The learned District Judge dismissed the complaint for the reasons that (1) since the plaintiff alleged that it was not infringing defendant's patent, no actual controversy existed; (2) the plaintiff did

not allege that it had been given notice of the claimed infringement, and (3) the notice in the trade publication was made in good faith and therefore could not give rise to a cause of action.”

Relative to this holding of the lower court, the Court of Appeals stated:

“Such a construction of the Federal Declaratory Judgments Act would, in our opinion, destroy its entire usefulness in patent litigation.”

It also said:

“We think that Professor Borchard has answered both points made by the learned District Judge in such convincing fashion that it is hardly necessary for us to do more than quote what he has to say. In speaking of the failure of a plaintiff to assert infringement and in criticizing the case, principally relied on by the court below, he has this to say:

“The decisions in several recent cases seem to be erroneous. In the case of *New Discoveries v. Wisconsin Alumni Research Foundation*, the plaintiffs were the owners of several patent processes for the manufacture of Vitamin D, and were engaged in the business of selling licenses therefor. The defendants were the owners of allegedly conflicting patents and had threatened the plaintiff and its licensees that they would infringe on defendant’s patents and would be liable in damages if they dealt in the article manufactured or about to be manufactured by the plaintiff. But on the ground that the plaintiff had not asserted that he or its licensees were actually using the processes in issue and thus already infringing, District Judge Stone considered the case academic or hypothetical, and dismissed the complaint. This seems altogether too narrow a view of justiciability. Contrary to the Judge’s opinion, the fact

that defendant notified the plaintiff and its licensees that the use of plaintiff's processes, licenses for which were under current sale, would infringe on defendant's patents, presented an "actual controversy" concerning the validity of the plaintiff's and defendant's processes. The many later cases in the Circuit Court of Appeals fortify this conclusion.' "

The Court of Appeals in the *Treemond v. Schering* case also said:

"There can be no doubt that an 'actual controversy' does not exist until the patentee makes some claim that his patent is being infringed. The claim need not be formally asserted; nor should it be necessary that notice be given directly to the plaintiff. Aside from the cases cited in the opinion of the learned District Judge direct notice has not been stressed. In fact, declaratory actions have been maintained within our own Circuit where the only allegation of notice was that given to the plaintiff's customers."

The Court of Appeals reversed the judgment of the District Court.

This *Treemond v. Schering* case is frequently cited and was referred to by Judge Mathes in the *Fluorescent Fabrics, Inc. v. Gantner & Mattern Company, et al.*, case referred to above.

The appellant refers on page 12 of his brief to the *New Discoveries v. Wisconsin Alumni* case, 13 Fed. Supp. 596. This case was referred to by Professor Borchard and his disapproval quoted in the *Treemond v. Schering* case. The appellant here has called to attention the case *Bettis v. Patterson-Ballagh Corp.* (D. C., S. D., Cal., 1936), 16 Fed. Supp. 455, 31 U. S. P. Q. 73, decided by Judge Yankwich. That case was one of the "several recent cases

(which) seem to be erroneous" referred to by Professor Borchard and was so identified in a footnote in the *Tree-mond v. Schering Corp.* case.

Appellant particularly called attention to the *Bettis v. Patterson-Ballagh Corp.* case which was decided in 1936, that is, some two years prior to the effective date of the Federal Rules of Civil Procedure. In that case Judge Yankwich said:

"It follows that the amended and supplemental Bill of Complaint does not state facts to constitute a cause of action for declaratory or other relief."

As discussed above, under the Federal Rules of Civil Procedure it is today not necessary to state such facts but only a claim.

That there exists an actual controversy between the owner of the patent and the appellee here is believed clear, and that a claim has been set forth in the cross-complaint also seems clear.

POINT III.

The Judgment Entered in Favor of Cross-Complainant Is Valid.

The position of the appellant appears to be that the judgment in the favor of the cross-complainant is void because the Court did not, in its discretion, see fit to hold hearings to establish the truth of the averments of the cross-complaint.

The cross-defendant Laurence Massa, the appellant here, appeared in the action and filed an answer. He refused, however, to comply with the order of the Court to answer interrogatories and, upon motion duly made, his answer was stricken and a default judgment was obtained [R. 99, 100].

Federal Rules of Civil Procedure, Rule 55(b)(2) provides:

“In all other cases the party entitled to a judgment by default shall apply to the court therefor; . . . If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.”

That rule places no burden upon the Court to conduct hearings but instead places the matter within its discretion with the words “the court may conduct such hearings or order such references as it deems necessary and proper.” The court below did not deem it necessary that any hearing be held to hand down a judgment which did not involve damages and which did not require an accounting. The appellant here made no motion to set aside the default and took no steps to have the default judgment vacated.

The appellant now complains that he did not have his day in court and seeks to avoid the results of his own default.

The position of the appellant that despite the fact all the well-pleaded, directly stated averments of the cross-complaint are accepted as true the appellee should be under the burden of proving their truth is simply not in accordance with the law. To support his position the appellant refers to certain presumptions which would place the

burden of proof upon a litigant seeking to have a patent held invalid or a trade-mark registration canceled. In the present case, however, by virtue of the default the well-pleaded allegations are accepted as proven.

There is no burden upon the party taking a default judgment to present evidence and this fact was clearly held in *United States v. Borchers* (C. C. A. 2d, 1947), 163 F. 2d 347, certiorari den., 68 S. C. 108, 332 U. S. 811, 92 L. Ed. 389. In that case Judge August N. Hand said:

“Moreover, as we understand the language of Rule 55(b)(2), it does not appear that testimony had to be presented to obtain a judgment by default. The opinion of the Supreme Court in *Baumgartner v. United States*, 322 U. S. 655, 64 S. C. 1240, 1243, 88 L. ed. 1525, holding that ‘proof to bring about a loss of citizenship must be clear and unequivocal’ was not uttered in relation to default judgments. As to such judgments the default of defendants who have been personally served may well take the place of ‘clear and unequivocal’ evidence required had the case gone to trial.”

Barron & Holtzoff, Volume 3, page 50, says in connection with defaults:

“The allegations of the complaint except as to the amount of damages, are taken as true.” (Citing *Northwestern Yeast Co. v. Broutin* (C. C. A. 6th, 1943), 133 F. 2d 628.)

The admitted allegations of the cross-complaint comprise the proof which the appellant seeks.

The matter was one which rested in the discretion of the Court and in the exercise of that discretion the Court

did not deem it necessary to receive testimony, there being no necessity for an accounting and no money damages being given.

Conclusion.

The appeal should be dismissed, for it is without merit. Costs and attorneys fees for the appellee are sought and seem clearly to be justified in view of the fact that the entire confusion and much unnecessary litigation are to be laid directly at the appellant's doorstep.

Respectfully submitted,

WILLIAM DOUGLAS SELLERS,
Attorney for Appellee.

No. 14935.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAURENCE MASSA,

Appellant,

vs.

JIFFY PRODUCTS CO., INC.,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

PETITION FOR REHEARING.

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FILED

FEB 18 1957

PAUL P. O'BRIEN, CLERK

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bradley v. Great Atlantic and Pacific Tea Co., 78 Fed. Supp. 388, reversed 340 U. S. 147, 91 S. Ct. 127, 95 L. Ed. 118, rehear. den. 340 U. S. 918, 71 S. Ct. 349, 95 L. Ed. 663.....	3
Brody v. Chas. F. Hubbs & Co., 11 F. R. D. 337.....	2
Drittel v. Friedman, 154 F. 2d 653.....	4, 5
Klapprott v. United States, 335 U. S. 601.....	3

STATUTES

Act of July 5, 1946, Sec. 46a.....	4
United States Code Annotated, Title 15, Sec. 102.....	4, 5
United States Code Annotated, Title 15, Sec. 1051.....	4
United States Code Annotated, Title 15, Sec. 1064.....	4, 5
United States Code Annotated, Title 15, Sec. 1119.....	3, 5

No. 14935.

IN THE

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FOR THE NINTH CIRCUIT

LAURENCE MASSA,

Appellant,

vs.

JIFFY PRODUCTS CO., INC.,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

PETITION FOR REHEARING.

*To the Honorable, Albert Lee Stephens, William E. Orr,
Circuit Judges, and John R. Ross, District Judge:*

The appellant above-named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition represent to the Court as follows:

We reserve our argued position as to each of the points of appeal, but in this petition address ourselves solely to that feature of the decision wherein we believe the Court may be convinced its result is based upon the application of incorrect legal principles.

Therefore this petition is devoted to convincing this Court that it has erred in its determination on four major questions put to it upon appeal.

1. On pages 2 and 3 of the printed opinion, the Court concluded that since Jiffy asked for a determination of the patent's validity in its counterclaim against Jetco, coupled with Jetco's admission of ownership of the patent, the case at bar is distinguishable from the case of *Brody v. Chas. F. Hubbs & Co.* (S. D. N. Y., 1951), 11 F. R. D. 337. In making this distinction the Court is overlooking that the *Brody* case held in effect that the question of the validity of a patent is not a necessary issue to be determined in an action for unfair competition. Thus, regardless, of whether the ownership of the patent was in Laurence Massa or in Jetco, the determination of its validity was not germane to the action for unfair competition and trademark infringement commenced by Jetco.

2. If Laurence Massa is really a necessary and indispensable party to the proceedings so that a complete determination of all issues may be had among all parties, it was still error to enter a default judgment adjudicating the rights to the trade-mark without the plaintiff, Jetco, participating therein. Since Jetco's action is for unfair competition in that defendant Jiffy was using the same mark as plaintiff Jetco on a similar product, plaintiff Jetco has a substantial interest in determining the ownership of the trade-mark. The default judgment barred it from participating in that phase of the trial: Jetco could offer no evidence to the contrary and could not cross-examine any

witnesses. Now by the entry of this default judgment Jetco is forever barred from participating in the determination of a vital issue to its case against Jiffy.

3. On pages 5-6 of its Opinion this Court has attempted to distinguish the case of *Klapprott v. United States*, 335 U. S. 601, from the case at bar by holding that a heavier burden is placed upon the government in a denaturalization proceeding than in a patent case which contains no sancity equivalent to the right of citizenship. In coming to this conclusion it is respectfully submitted by your petitioner that this Court has overlooked the fact that *both* cases require evidence that must be clear, unequivocal and convincing, rising to the dignity of perhaps *beyond a reasonable doubt*. *Bradley v. Great Atlantic and Pacific Tea Co.*, 78 Fed. Supp. 388, 390-391, reversed on other grounds, 340 U. S. 147, 91 S. Ct. 127, 95 L. Ed. 118; rehearing denied 340 U. S. 918; 71 S. Ct. 349; 95 L. Ed. 663; *Klapprott v. United States*, 335 U. S. 601, 612.)

In the *Bradley* case the Court also emphasized that the presumption of validity is so great that it may not be destroyed by evidence recognized as sufficient in a civil case (p. 390). It is, therefore, respectfully submitted that even accepting as true all well pleaded averments in a verified complaint, although probably recognized as sufficient evidence in a civil case, it is still insufficient to overcome the presumption of the validity of a patent.

4. The Court on pages 6-7 of its printed opinion held that 15 U. S. C. A. 1119 has overruled the principle of

law enunciated in *Drittel v. Friedman* (2d Cir., 1946), 154 F. 2d 653.

The *Drittel* case was based on 15 U. S. C. A. 102, which read as follows:

“That whenever there are interfering registered trade-marks, any person interested in any one of them may have relief against the interfering registrant, and all persons interested under him, by suit in equity against the said registrant; and the court, on notice to adverse parties and other due proceedings had according to the cause of equity, may adjudge and declare either of the registrations void in whole or in part according to the interest of the parties in the trade-mark, and may order the certificate of registration to be delivered up to the Commissioner of Patents for cancellation.”

United States Code Annotated, Title 15, Section 1064, now in effect, reads in part as follows:

“§1064. Cancellation of registration. Any person who believes that he is or will be damaged by the registration of a mark on the principal register established by this chapter, or under the Act of March 3, 1881, or the Act of February 20, 1905, may upon the payment of the prescribed fee, apply to cancel said registration . . .

(a) within five years from the date of the registration of the mark under this chapter; or . . .”

Section 46a of the Act of July 5, 1946 (historical note following 15 U. S. C. A. 1051) provides in part as follows:

“That the repeal of all inconsistent Acts ‘shall not affect the validity of registrations granted or applied

for under any of said Acts prior to the effective date of this Act (July 5, 1947), or rights or remedies thereunder except as provided in sections 8, 12, 14, 15 and 47 of this Act (sections 1058, 1062, 1064, 1065, and note to this section of this title).’ ”

The *Drittel* case refers to procedure, namely, that parties seeking title or ownership to a trade-mark must first make its application to the Commissioner of Patents. It is respectfully submitted that 15 U. S. C. A. 1119 is not so radically different from its former 15 U. S. C. A. 102, as to amount to an overruling of the procedural requirements set forth in the *Drittel* case, particularly if read in conjunction with 15 U. S. C. A. 1064. The latter section is especially important since it requires an aggrieved individual to apply for cancellation of the registration within five years from the date of the registration of the mark as a prerequisite.

For the foregoing reasons it is respectfully requested that this petition for a rehearing should be granted.

Respectfully submitted,

JOSEPH W. FAIRFIELD and

ETHELYN F. BLACK,

Attorneys for Appellant.

State of California, County of Los Angeles—ss.

JOSEPH W. FAIRFIELD, being first duly sworn, on oath certifies and says:

That he is one of the attorneys for appellant in this cause; that he makes this Certificate in compliance with Rule 23 of the rules of this Court; that in his judgment the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.

JOSEPH W. FAIRFIELD

Subscribed and sworn to before me at Los Angeles, California, this 15th day of February, 1957.

ETHELYN F. BLACK

*Notary Public in and for the State of California,
County of Los Angeles.*

No. 14945

United States
Court of Appeals
for the Ninth Circuit

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation,
and THE OJAI VALLEY COMPANY, a Corporation,

Appellees.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 136)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

MAY 18 1956

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WILLIAM ALFRED LUCKING,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	56
Attorneys, Names and Addresses of.....	1
Amended Reply to Request for Admissions.....	105
Certificate by Clerk.....	131
Complaint, First Amended.....	3
Ex. A—Articles of Incorporation of Ojai Mutual Water Co.	26
B—Certificate of Amendment of Articles of Incorporation of Ojai Mutual Water Co.	34
C—Articles of Incorporation of The Ojai Valley Co.	41
D—Certificate of Amendment to Articles of Incorporation of The Ojai Valley Co.	48
E—Description of Land.....	51
F—Description of Land.....	51
G—Description of Land.....	52
Findings of Fact and Conclusions of Law.....	120

INDEX	PAGE
Judgment Barring Taking of Further Evidence and Dismissal of Complaint.....	125
Judgment Relative to Amendment to Articles of Incorporation, Etc.	123
Minutes of the Court March 10, 1954.....	120
Notice of Appeal.....	128
Notice of Motion to Dismiss.....	55
Request for Admission	83
Ex. E—Letter Dated September 29, 1948.....	91
F—Letter Dated October 4, 1948.....	94
G—Letter Dated May 24, 1949.....	95
H—Letter Dated May 27, 1949.....	98
I—Letter Dated April 27, 1950.....	99
J—Letter Dated May 3, 1950.....	102
K—Letter Dated May 24, 1950.....	103
Statement of Points on Appeal, Appellant's (U.S.D.C.)	129
Statement of Points and Designation of Record, Appellant's, Adoption of (U.S.C.A.).....	134
Stipulation for Consolidation of Actions for Printing, Briefing and Hearing.....	135
Order Re	136

INDEX

PAGE

Transcript of Proceedings.....	137
--------------------------------	-----

Witnesses:

Butler, Dr. Charles T.

—direct246

—cross254

Harmon, Rawson B.

—direct217, 227, 256

—cross258

Jackson, Mrs. Eldred

—direct228

Lucking, William Alfred

—direct210

Wilcox, Charles Justus

—direct188, 209

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In the District Court of the United States for the
Southern District of California, Central Di-
vision

No. 13197-HW

WILLIAM ALFRED LUCKING,

Plaintiff,

vs.

OJAI MUTUAL WATER COMPANY, a Corpora-
tion, and THE OJAI VALLEY COMPANY,
a Corporation,

Defendants.

FIRST AMENDED COMPLAINT

Action for Cancellation of Mutual Water Company
Control Shares of Stock, and for Further Relief

Plaintiff by stipulation files this his First
Amended Complaint, and complains on behalf of
himself and on behalf of all other stockholders of
Ojai Mutual Water Company, a California Corpora-
tion, and for cause of action alleges:

I.

That the question which is the subject of this
action is one of common and general interest to all
of the holders of the capital stock of Defendant
Ojai Mutual Water Company, a California Corpora-
tion, and common questions of law and fact are in-
volved affecting the rights of said stockholders of
Ojai Mutual Water Company; that the holders of

said capital stock are so numerous as to make it impracticable to bring them all before the Court. [2*]

II.

Plaintiff is a citizen of the County of Washtenaw in the State of Michigan, and is of full age and is the owner of upwards of One Hundred (100) shares of the capital stock of the Ojai Mutual Water Company.

III.

(a) Defendant Ojai Mutual Water Company is a corporation duly organized and existing under the laws of the State of California and was incorporated in May, 1920, for the purpose of owning water and water rights in Ojai and vicinity, in Ventura County, and to deliver water to its stockholders only for their exclusive use upon lands owned by them within certain District boundaries.

A copy of the Articles of Incorporation of said Company is attached hereto as Exhibit "A," reference to which is hereby made.

A copy of a Certificate of Amendment to said Articles of Incorporation, dated July 12, 1935, and filed in the office of the Secretary of State on September 2, 1935, is attached hereto as Exhibit "B," reference to which is hereby made.

(b) Defendant, The Ojai Valley Company, is a corporation duly organized and existing under the laws of the State of Ohio, having been incorporated

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

therein on or about the 4th day of September, 1922, and said The Ojai Valley Company was duly admitted to transact business within the State of California, and in particular Ventura County, and has for the last twenty (20) years and upwards been the owner of certain valuable residential and agricultural properties in a district lying west of Foothills Road and south of Fairview Road, within the Ojai Valley, and originally comprising a total of approximately five hundred (500) acres; the greater part of this district being known as Arbolada and West Hills tracts; and that, upon information and belief, Defendant, The Ojai Valley Company, is now wholly owned by the Trustees of the Edward D. Libbey [3] Estate, and was wholly owned by said Edward D. Libbey and his immediate family from time of incorporation till said Mr. Libbey's death.

Copies of the Articles of Incorporation and Certificate of Amendment thereof, of said The Ojai Valley Company, are attached hereto, marked Exhibits "C" and "D," respectively, reference to which is hereby made.

(c) The interests and rights forming the subject matter in controversy exceeds, exclusive of interests and costs, the value of Three Thousand Dollars (\$3,000.00), namely One Hundred Thousand Dollars (\$100,000.00) and upwards, and also involve land and interests in land in Ventura County and within the jurisdiction of this Court.

IV.

That on or about January 11, 1928, plaintiff purchased on land contract from Florence Scott Libbey, a widow, fifteen acres more or less, lying west of Del Norte Road and north of property owned by defendant The Ojai Valley Company and situated in said Ojai Valley, for the sum of Thirty Thousand Dollars (\$30,000.00), and which contract was modified on February 9, 1928, so as to cover 15.988 acres at the same price of Two Thousand Dollars (\$2,000.00) per acre, a description of which land is attached hereto, marked Exhibit "E," reference to which is hereby made.

It was a part of said contract of purchase and sale that, upon completion of the payments therein specified, plaintiff should receive thirty-two (32) shares of said defendant Ojai Mutual Water Company's capital stock, as fully paid, and which thirty-two (32) shares were afterwards, upon completion of said contract, issued and delivered to plaintiff by Certificates for said shares.

V.

That on or about September 26, 1930, plaintiff purchased on land contract from Florence Scott Libbey, a widow, 33.322 acres [4] more or less, of land adjoining said first purchased land, as set forth in paragraph IV hereof, for a total purchase price of Twenty-five Thousand Dollars (\$25,000.00), payable on or before January 1, 1935, as specified.

It was a condition of said last mentioned contract

that seller, upon the execution of the contract and the final payments therein specified, should deliver to plaintiff as buyer "free of charge ninety-nine (99) shares of the capital stock, fully paid, of the Ojai Mutual Water Company."

That on or about the 13th day of November, 1940, plaintiff completed said payments of \$25,000.00 and received a grant deed from defendant, The Ojai Valley Company, grantee of said vendor and seller, Florence Scott Libbey, of said 33.322 acres, which was duly recorded on September 29, 1942, in Volume 661 of Official Records, page 373 of Ventura County, and at the same time there was delivered to plaintiff Certificate No. 112, dated September 26, 1930, for said 99 shares of the capital stock of said defendant, Ojai Mutual Water Company. A description of said land is attached hereto and marked Exhibit "F," reference to which is hereby made.

VI.

That at the time of making the aforesaid purchases plaintiff had no knowledge of the contents of the Articles of Incorporation, Exhibit "A," or of the Amendment thereto, dated July 12, 1935, Exhibit "B."

VII.

(a) That on or about May 21, 1945, plaintiff purchased on land contract from defendant, The Ojai Valley Company, 20.82 acres more or less, bounded by Del Norte and Fairview Roads and Foothills Road in said Ojai Valley, and adjoining said two previous purchases, for the sum of Fifteen Thou-

sand Dollars (\$15,000.00), payable before May 1, 1952, which transaction was completed by the making of said payments on or about the 10th day of June, 1950, at [5] which time plaintiff received a Grant Deed for said land and recorded it June 30, 1950, in Book 938, of Official Records, page 369, of Ventura County, California, a description of which land is attached hereto and marked Exhibit "G," reference to which is hereby made.

(b) In the negotiations leading up to the making of said contract of May 21, 1945, the plaintiff requested that as a part of the said transaction he receive four shares per acre of defendant Ojai Mutual Water Company's capital stock; C. J. Wilcox of Toledo, Ohio, the chief executive officer of both defendants, refused to grant this request on the ground that said shares of capital stock would make the purchase price of this property on entirely too low a basis; and on or about June 12, 1945, plaintiff received as a part of said last mentioned purchase, Certificate No. 195 for twenty shares of said Ojai Mutual Water Company capital stock.

VIII.

In summary, plaintiff further shows that said first and second transactions were made and entered into at a time prior to July 12, 1935, when said Amendment to the Articles of Incorporation of said defendant Ojai Mutual Water Company was filed, being Exhibit "B."

That said amendment reduced the requisite num-

ber of shares of said Ojai Mutual Water Company which should be assigned or allocated to each one acre of land to be owned by the stockholders of said Ojai Mutual Water Company, which Amendment thus substituted "One share per acre" for the previous requirement of the original Articles of Incorporation of "four shares per acre" as provided for by Exhibit "A."

That of the stockholders meeting of said defendant, Ojai Mutual Water Company, at which this Amendment, Exhibit "B," was authorized, plaintiff received no notice of said intended Amendment [6] to said Articles of Incorporation as required by law; and upon information, no such notice of said intended Amendment was given as required by law.

IX.

That at no time during the entire period of the incorporation of said Ojai Mutual Water Company did the said The Ojai Valley Company or any person acting for the Libbey interests, so-called, own or intend to acquire (or intend should be served by said Ojai Mutual Water Company's facilities) more than approximately five hundred (500) acres, and all lying within the said Arbolada and West Hills tracts, as aforesaid, or immediately adjacent thereto.

X.

(a) That throughout the years from 1922 on down through 1948, the said The Ojai Valley Company and the Libbey interests had sold for residence purposes a total of approximately three hundred

(300) acres, and upon which had been erected, by the respective purchasers, residences of the total value of upwards of \$1,500,000.00, thus leaving in the ownership of defendant, The Ojai Valley Company, of record, an unnecessary excess or surplus of about thirteen hundred (1,300) shares of said Ojai Mutual Water Company's issued and outstanding stock.

(b) That at no time prior to the spring of 1948, did plaintiff learn of the substance or existence of Exhibit "B" or of the facts stated in paragraph X(a) above.

XI.

That said two defendants had always treated all purchasers of land in said Water District from the said Libbey interests and said The Ojai Valley Company as eligible for water, without complying with the formalities required by the Articles and Bylaws of defendant Ojai Mutual Water Company.

Further, upon information, that at all times since the incorporation of said Ojai Mutual Water Company in 1922, there has been [7] in the ownership of said The Ojai Valley Company sufficient Ojai Mutual Water Company shares to have allowed to the said purchasers of said subdivision lots or land, a ratio of four (4) shares for each acre thereof purchased, as required by the original Articles of Incorporation of said Water Company, Exhibit "A."

XII.

That upon information and belief the entire cost of all the plant and equipment and property of said

Ojai Mutual Water Company has been fully paid for from time to time by water dues collected by said Ojai Mutual Water Company while in the control of said The Ojai Valley Company or of the Libbey interests so-called, on account of any cost of said Ojai Mutual Water Company's wells, mains, pumps and other facilities, all of which have been paid for fully from said water dues.

And further, upon information, that never during the times complained of herein have any of the said 1500 shares more or less held in the name, of record, of defendant The Ojai Valley Company, contributed any sums of money whatsoever by way of assessments or water dues, for the payment of the afore-said facilities, for the reason that there has never been a stock assessment against the holders of shares of defendant Ojai Mutual Water Company and for the further reason that no water has ever been used for, by or in connection with any of said 1500 shares more or less.

XIII.

That at the present time the defendant, The Ojai Valley Company, which still holds said surplus of 1300 shares, more or less, of Ojai Mutual Water Company stock, has no unsold land eligible to acquire said surplus shares or to receive water there-upon from the defendant Ojai Mutual Water Company.

XIV.

That said surplus of 1300 shares, more or less, entitles the defendant, The Ojai Valley Company, to

one vote per share for directors [8] of said Ojai Mutual Water Company and thus constitutes control of said Ojai Mutual Water Company.

XV.

That said defendant Ojai Mutual Water Company's facilities constitute the only adequate and sufficient source of water to the stockholders thereof who are the grantees of defendant The Ojai Valley Company and the Libbey interests, so-called, and said water supply is necessary to said shareholders and water users in general, and to this plaintiff in particular, to maintain their homes and lands and the value thereof.

XVI.

That the water supply in the Ojai Valley generally, and in the so-called basin from which defendant, Ojai Mutual Water Company, receives its water, is critically short; that on or about June 1, 1951, the static water levels of the defendant Ojai Mutual Water Company's wells were about 100% lower than they were three years ago, and the same percentage applies to the present draw-down levels in said wells; that there is not sufficient water available to defendant Ojai Mutual Water Company to permit extension of its water distribution in any manner whatsoever, without seriously diminishing the amounts of water presently being supplied to its shareholders.

That, upon information, defendant, Ojai Mutual Water Company, has declared it to be advisable and

necessary to attempt to drill a new well because of said critical water shortage.

XVII.

Upon information, plaintiff shows that the entire cost to said Libbey interests as promoters of said The Ojai Valley Company and Ojai Mutual Water Company, for all the property, plant and facilities of said Ojai Mutual Water Company—does not exceed One Hundred Thousand Dollars (\$100,000.00), or approximately \$50.00 per share, and that the same has been fully paid back, as aforesaid, by [9] sales of shares of said Ojai Mutual Water Company and sales of said 300 acres more or less.

XVIII.

That defendant, The Ojai Valley Company, has offered to sell and threatens to sell all of its approximately 1500 shares of Ojai Mutual Water Company stock, at a price greatly in excess of said \$50.00 per share;

That this represents an excessive and unwarranted profit to the promoters of the said Ojai Mutual Water Company.

XIX.

That in April, 1950, plaintiff demanded of C. J. Wilcox (the chief executive officer of both defendants and of the Trustees of the Estate of Edward D. Libbey) that he have said balance of 1300 shares more or less of Ojai Mutual Water Company stock

cancelled or put in trust for the individual owners of land who were then shareholders and users of said Ojai Mutual Water Company water and to protect the valuable investments of said owners, and pointed out to said C. J. Wilcox that said owners would suffer serious injury and loss if at any time said 1300 shares, more or less, of Ojai Mutual Water Company stock were sold or transferred by defendant, The Ojai Valley Company, for any purpose or to any person or corporation whatever;

To which statements and demands so made by plaintiff, said C. J. Wilcox replied that he had not made up his mind about the final use or disposition of said balance of 1300 shares more or less of Ojai Mutual Water Company stock, and said C. J. Wilcox has refused and neglected to act on said demands of plaintiff.

XX.

That plaintiff has purchased upwards of Fifty Thousand Dollars (\$50,000.00) of the property of said Libbey interests so-called and of defendant, The Ojai Valley Company, in said Ojai Valley and expended upwards of a similar sum in improvements thereon—and that [10] plaintiff has now a real substantial interest in safeguarding said investments, and his own and all other individual owners of said Water Company shares who are grantees of lands from said The Ojai Valley Company and Libbey interests so-called.

And for a Second and Separate Cause of Action,
Plaintiff Alleges:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XX, inclusive, of the first cause of action, to which reference is hereby made, and the same are hereby incorporated and referred to in this second cause of action and made a part hereof as though the same were again fully set forth.

II.

That the officers and agents of both defendant corporations did, by their declarations to proposed purchasers of lands from defendant The Ojai Valley Company and the Libbey interests, and by acts evincing to said proposed purchasers an intention to that effect, hold out that the water to be supplied by defendant Ojai Mutual Water Company would be used solely for the benefit of the lands then held and to be transferred by defendant The Ojai Valley Company and the Libbey interests; that in pursuance of this intention and purpose the defendant Ojai Mutual Water Company constructed a water distribution system extending to said lands originally owned by defendant The Ojai Valley Company and the Libbey interests, and that defendant The Ojai Valley Company obtained purchasers, including this plaintiff, for said lands on the faith of such intention and purpose. That plaintiff has, at all times, done and performed all of the conditions and agreements to be performed on his part at the time and in the manner required.

III.

Further, that said officers and agents, by their declarations [11] to plaintiff and by their acts evincing to plaintiff an intention to that effect, held out and implied that control of defendant Ojai Mutual Water Company would ultimately rest effectively in the grantees of defendant The Ojai Valley Company and of the Libbey interests who were shareholders of said Water Company and users of the water supplied by said Water Company's facilities.

IV.

That by reason of said invalid 1935 Amendment to the Articles of Incorporation of defendant Ojai Mutual Water Company, the interest in water represented by each share of said Water Company was proportionately diminished, because more shares of said Ojai Mutual Water Company were available for lands other than those for which originally intended and as held out to purchasers as aforesaid. That by reason of the foregoing plaintiff and the other grantees of said The Ojai Valley Company and the Libbey interests, so-called, who are shareholders and users of defendant Ojai Mutual Water Company water, have been deprived of control of said Water Company.

V.

That the failure and refusal of the officers and directors of both of defendant corporations to act upon plaintiff's demands, as aforesaid, constitutes a repudiation of the understanding and agreement between plaintiff and defendant corporations as hereinabove set forth.

VI.

That by reason of the foregoing, plaintiff and the other users of defendant Ojai Mutual Water Company water have been injured as aforesaid, and greater injury is threatened by future transfer of said 1300 surplus shares to any person or corporation whatsoever, all of which injury is irreparable and cannot be properly compensated for by monetary damages.

And for a Third and Separate Cause of Action,
Plaintiff Alleges: [12]

I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XX, inclusive, of the first cause of action, to which reference is hereby made, and the same are hereby incorporated and referred to in this third cause of action and made a part hereof as though the same were again fully set forth.

II.

That by reason of the actions of defendant Ojai Mutual Water Company and the invalid 1935 Amendment to its Articles of Incorporation, corporate acts done by defendant Ojai Mutual Water Company pursuant to the provisions of said 1935 Amendment to its Articles of Incorporation have been and are ultra vires and void.

III.

That by reason of the foregoing, plaintiff and the other users of defendant Ojai Mutual Water Com-

pany water have been injured as aforesaid, and greater injury is threatened by future transfer of said 1300 surplus shares to any person or corporation whatsoever, all of which injury is irreparable and cannot be properly compensated for by monetary damages.

And for a Fourth and Separate Cause of Action,
Plaintiff Alleges:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XX, inclusive, of the first cause of action, together with Paragraphs II and III of the second cause of action, to which reference is hereby made, and the same are hereby incorporated and referred to in this fourth cause of action and made a part hereof as though the same were again fully set forth.

II.

That defendant, The Ojai Valley Company (wholly owned by the Libbey interests so-called who were the promoters of both defendants), [13] holds said 1300 shares of Ojai Mutual Water Company stock as trustee for the benefit of the grantees of lands originally owned, as aforesaid, by the defendant, The Ojai Valley Company, and the Libbey interests.

III.

That the threatened receipt by defendant, The Ojai Valley Company, of unwarranted and unjustified profit from sale of said 1300 surplus shares of defendant Ojai Mutual Water Company, and the

threatened and actual diminution of the water rights of plaintiff and other shareholders similarly situated constitutes a breach of said trust.

IV.

That by reason of the foregoing, plaintiff and the other users of defendant Ojai Mutual Water Company water have been injured as aforesaid, and greater injury is threatened by future transfer of said 1300 surplus shares to any person or corporation whatsoever, all of which injury is irreparable and cannot be properly compensated for by monetary damages.

And for a Fifth and Separate Cause of Action,
Plaintiff Alleges:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XX, inclusive, of the first cause of action, to which reference is hereby made, and the same are hereby incorporated and referred to in this fifth cause of action and made a part hereof as though the same were again fully set forth.

II.

That none of the present users of water supplied by defendant, Ojai Mutual Water Company, is an overlying owner; that water is imported by said Water Company upwards of two miles from the Ojai Valley basin, so-called, an underground source; that there are [14] numerous other users of water from said basin; that said Ojai Valley basin, so-

called, is now seriously depleted and overdrawn, and there is insufficient water therein for any extension of water use over what is presently being withdrawn therefrom; that all water rights acquired in connection with use of Ojai Mutual Water Company water have been acquired by plaintiff and the shareholders of said Water Company who have made actual beneficial use of said water; that all pipelines, wells and other facilities of defendant, Ojai Mutual Water Company, have been paid for by shareholders who have actually used said water; that none of said 1500 shares of said defendant, Ojai Mutual Water Company, now of record in the name of defendant, The Ojai Valley Company, has by beneficial use or otherwise acquired any water rights whatsoever by appropriation; that this water right, as aforesaid, is real property.

III.

That by reason of the critical water shortage, as aforesaid, the defendant, Ojai Mutual Water Company, is able adequately to supply only the present users of water in the maintenance and upkeep of their homes and lands, and there is insufficient water to extend the services of the defendant, Ojai Mutual Water Company, in any manner whatsoever.

IV.

That the threatened diversion and dilution of water interests of the present users of water who are shareholders of defendant, Ojai Mutual Water Company, and grantees of defendant, The Ojai Val-

ley Company and the Libbey interests, would cause great and irreparable injury to plaintiff and to all shareholders similarly situated for which there is no adequate remedy at law.

And for a Sixth and Separate Cause of Action,
Plaintiff Alleges: [15]

I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XX, inclusive, of the first cause of action, together with Paragraphs II and III of the fifth cause of action, to which reference is hereby made, and the same are hereby incorporated and referred to in this sixth cause of action and made a part hereof as though the same were again fully set forth.

II.

That at all times complained of herein, as between The Ojai Valley Company, the shareholders of defendant Ojai Mutual Water Company who are grantees of defendant The Ojai Valley Company and Libbey interests, and the Ojai Mutual Water Company itself, said shares were and are treated as appurtenant to the land granted to said shareholders by defendant The Ojai Valley Company, and Libbey interests, by the acts and declarations of defendants Ojai Mutual Water Company and The Ojai Valley Company.

III.

That by reason of the foregoing, said surplus 1300 shares, more or less, presently of record in

the name of defendant The Ojai Valley Company, have improperly and in violation of the declarations and acts evincing such declarations, been treated and held as personalty.

IV.

That by reason of this aforesaid 1300 shares being treated by defendant The Ojai Valley Company as personalty and thus freely transferable, and by reason of said threatened sale of said 1300 shares, plaintiff and those shareholders of defendant Ojai Mutual Water Company who are similarly situated would suffer irreparable injury which cannot adequately be compensated for by monetary damages.

And for a Seventh and Separate Cause of Action, Plaintiff Alleges: [16]

I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XX, inclusive, of the first cause of action, Paragraphs II, III and IV of the second cause of action, Paragraphs II and III of the fourth cause of action, Paragraphs II and III of the fifth cause of action, and Paragraphs II and III of the sixth cause of action, to which reference is hereby made, and the same are hereby incorporated and referred to in this seventh cause of action and made a part hereof as though the same were again fully set forth.

II.

That an actual controversy exists by reason of the foregoing, in that plaintiff claims that defendant

The Ojai Valley Company has no right to own, vote, or sell said surplus 1300 shares of defendant Ojai Mutual Water Company, and defendant The Ojai Valley Company does so claim such rights and does so vote said shares and does threaten to sell said shares, all to the irreparable injury of plaintiff and those shareholders of defendant Ojai Mutual Water Company who are users of said water and who are grantees of defendant The Ojai Valley Company and the Libbey interests so-called.

Wherefore, the plaintiff prays judgment:

(1) That the defendant The Ojai Valley Company be enjoined and restrained, during the pendency of the above-entitled action and until its final determination, or until the Court shall otherwise order, from selling or in any manner transferring or becoming obligated to transfer, any share or shares of stock in the Ojai Mutual Water Company, a California corporation, except as herein provided, to wit: shares may be so transferred to owners of record of land within the boundaries of that area to be served by said Ojai Mutual Water Company as now set forth in the Articles of Incorporation of said Ojai Mutual Water Company, as amended, on file in the Office of the County Clerk, County of Ventura, State of [17] California, and which land is now owned by the said The Ojai Valley Company and does not exceed two hundred (200) acres; and the number of shares which may be transferred shall not exceed two hundred (200) shares, that is to say, shall not exceed one (1) share

per acre of such land now owned by said defendant, which now totals about two hundred (200) acres, and which said defendant is now offering for sale to the public.

(2) That the defendant The Ojai Valley Company be enjoined and restrained, during the pendency of the above-entitled action and until its final determination, or until the Court shall otherwise order, from voting more than one share of the stock of the Ojai Mutual Water Company for every acre of land now owned and held by said defendant The Ojai Valley Company, and which unsold land does not exceed two hundred (200) acres.

(3) That the defendant The Ojai Valley Company be forever enjoined and restrained from voting more than one share of the stock of the Ojai Mutual Water Company for every acre of land then owned by said defendant The Ojai Valley Company at time for said voting.

(4) That defendant The Ojai Valley Company deliver up thirteen hundred (1300) shares of the stock of the Ojai Mutual Water Company to the officers of said Ojai Mutual Water Company for retirement of said shares, said shares to be held as authorized but unissued shares of said Ojai Mutual Water Company; or

(5) That defendant The Ojai Valley Company deliver up for cancellation said thirteen hundred (1300) shares of the stock of the Ojai Mutual Water Company; or

(6) That the defendant The Ojai Valley Company be ordered to distribute said thirteen hundred (1300) shares of said capital stock of said defendant Water Company pro rata on an acreage basis to present holders of record shares of said capital stock of said defendant Ojai Mutual Water Company, and which owners of said [18] shares are now owners of lands granted to them by The Ojai Valley Company and Libbey interests and which are within the boundaries of the area to be served by said Ojai Mutual Water Company as now set forth in the Articles of Incorporation of said Ojai Mutual Water Company, as amended, and on file in the office of the County Clerk, County of Ventura, State of California, and are attached to this complaint and marked Exhibits "A" and "B" thereof.

(7) That it be adjudged that the record holder of said thirteen hundred (1300) shares of said Ojai Mutual Water Company, namely defendant The Ojai Valley Company, has no right to make a profit of any kind or nature of or from said thirteen hundred (1300) shares of the said Ojai Mutual Water Company.

(8) That this Court take an account of any moneys owing for said Ojai Mutual Water Company's plant—and if a balance in favor of said The Ojai Valley Company is found, that its payment be provided for in some equitable manner, which leaves control of said Ojai Mutual Water Company in the grantees of defendant The Ojai Valley Company and the said Libbey interests.

(9) Or in the alternative, that a declaratory judgment be entered declaring and adjudicating the respective rights and duties of plaintiffs and both defendants in the premises, and declaring and determining that defendant The Ojai Valley Company is not entitled to vote, sell, or make a profit of any kind or nature of or from said surplus 1300 shares of said Ojai Mutual Water Company.

(10) For costs of suit, and for such other and further relief as to the Court may seem just in the premises.

Dated October 30, 1951.

JOHNSTON & LUCKING,

By /s/ WM. A. LUCKING, JR.,

Attorneys for Plaintiff. [19]

EXHIBIT "A"

Articles of Incorporation of Ojai Mutual Water Company

Know All Men by These Presents:

That we, the undersigned, the majority of whom are citizens and residents of the State of California, have voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California;

And We Do Hereby Certify:

First: That the name of said corporation is Ojai Mutual Water Company;

Second: That the purposes for which it is formed are: To acquire, hold, manage and control water and water rights and water bearing lands in Ojai and vicinity in Ventura County, California, together with such personal and other real property, easements, and appurtenances as may be necessary or convenient to carry out the purposes or objects of the company and to deliver said water to its stockholders only for their exclusive use upon lands owned by them or in their lawful possession, situate, lying and being within the exterior boundaries of the following described property:

Situate, lying and being in the County of Ventura, State of California, and described as:

A part of Lots six (6), seven (7), and eight (8), ten (10), thirteen (13), fourteen (14), and fifteen (15), as the same is designated and delineated upon that certain map entitled "The Bard Subdivision of the Rancho Ojai, Tracts as surveyed by Thomas H. Bard, 1867-1870, Ventura County, Cal.," as recorded in the office of the County Recorder of said Ventura County in Book 5 of Miscellaneous Records, (Maps), at page numbered 25½ and all of Sections one (1), two (2), and three (3) Township Four (4) North, Range twenty-three (23) West, San [20] Bernardino base and meridian as the same is designated and delineated upon the official plat

of the survey of said lands returned to the general land office by the Surveyor-General, and particularly described as an entirety as follows:

Beginning at a point in Line No. 12 of the final survey of said Rancho Ojai district south 70° West 44.43 chains from a live oak marked "0.20" standing at Sta. No. 12 of the final survey of said Rancho Ojai, said point of beginning being the northwest corner of lands of James C. Daly; thence from said point of beginning,

1st:—South along the west line of said lands of James C. Daly and along the west line of lands of Hattie G. Cota to a point in the center line of that certain public road 60.00 feet wide locally known as and called Ojai Avenue; thence along same,

2nd:—South $84^{\circ} 15'$ west to a point in the center line of that certain public street in the town of Nordhoff, locally known as and called "Montgomery Street"; thence,

3rd:—Southerly along the center line of said Montgomery Street, that certain public street 60.00 feet wide in the town of Nordhoff, locally known as and called "Live Oak Street," and along the center line of that certain public road 60.00 feet wide locally known as and called "Creek Road" following the meander of said streets and road to a point in the center line of that certain creek, locally known as and called "Arroyo San Antonia," thence

4th:—Southwesterly along the general course of the center line of said Arroyo San Antonio follow-

ing its meanders to a point in the easterly line of that certain parcel of land subdivided into lots and streets as the same is designated and delineated upon that certain map entitled "Subdivision of lands of Ojai Land Company, being a part of Rancho Ojai, Ventura County, California," as recorded in the office of the County Recorder of said Ventura County in Book 3 of Miscellaneous Records (Maps), at page 42, thence

5th:—North $30^{\circ} 30'$ West along the easterly line of said "Ojai Land Company Subdivision" to the southeast corner of lands of Elise Meiners, et al., thence

6th:—North $15^{\circ} 54'$ east along the east line of said lands of Elise Meiners, et al. and along the west line of lands of William Kerfoot, Tonie Grant, K. P. Grant, and Edward D. Libbey, to a point in the north line of that certain public road locally known as and called "Matilija Road," thence,

7th:—Northwesterly along the northerly line of said [21] Matilija Road to a point in line No. 13 of the final survey of said Rancho Ojai; thence along same,

8th:—North 87° west to the corner common to Sections three (3) and four (4), Township four (4) North, range twenty-three (23) West of the San Bernardino base meridian; thence

9th:—North to the corner common to said Sections three (3) and four (4), Township four (4) North, Range twenty-three (23) and sections thirty-

three (33) and thirty-four (34), Township five (5) North, Range twenty-three (23) West, San Bernardino base meridian; thence

10th:—East along the township line between township four (4) North, Range twenty-three (23) West of the San Bernardino base meridian, and Township Five (5) North, range twenty-three (23) West of the San Bernardino base meridian to a point in Line No. 12 of the final survey of said Rancho Ojai; thence along same

11th:—North 70° East to the point of beginning. Provided that any stockholder desiring to use and using said water shall be the owner of one share of the capital stock of the company for each one-quarter acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above-described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the Bylaws of the company may determine. Mere ownership of stock in said company or of land situated within the above-described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible.

This company is not authorized to engage in the business of selling, dealing in or distributing said or any water for profit, or for compensation, or as

a public service corporation, and none of its waters shall ever be for sale, rental or distribution, and for the delivery of said water to them by said company said stockholders shall pay only such an amount as may be sufficient to pay the cost of management, maintenance and operation of [22] the company and for the delivery of said water to them.

The Company shall deliver said water fairly, impartially and equitably among and to its qualified stockholders desiring said water, so long as they shall observe the rules and regulations defined in the Bylaws of the company and prescribed by the board of directors for the use and delivery of said water, and said company is hereby authorized and empowered to prescribe by appropriate Bylaws, all needful rules and regulations for the fair and equitable delivery of said water.

The company shall have power to borrow money and secure the same by mortgage or other appropriate form of security.

To purchase, or otherwise acquire, own, hold, mortgage, pledge, sell and dispose of debts, dues, demands or choses in action, public bonds or stocks, and bonds and shares of capital stock of any corporation or corporations, including membership in non-capital stock corporations and while the owner thereof to exercise all the rights and privileges of ownership, including the right to vote thereon.

Third: That the place where the principle business of this corporation is to be transacted is Ojai, Ventura County, California;

Fourth: That the term for which said corporation is to exist is fifty years from and after the date of its incorporation;

Fifth: That the number of directors of said corporation shall be three and the names and places of residence of the directors who are appointed for the first year and to serve until the election and qualification of such officers, are as follows:

Names	Whose Residence is at:
Edward D. Libbey	Toledo, Ohio
Frank Mead	Ojai, California
H. T. Sinclair	Ojai, California

Sixth: That the amount of the capital stock of said [23] corporation is \$150,000.00 and the number of shares into which it is divided is 3000 shares of the par value of \$50.00;

Seventh: That the amount of the capital stock which has been subscribed is \$150,000.00, and the following are the names of the persons by whom the same has been subscribed, to wit:

Names of Subscribers	Number of Shares &	Amount
Edward D. Libbey	1	\$50.00
Frank Mead	1	\$50.00
H. T. Sinclair	1	\$50.00

In Witness Whereof, we have hereunto set our hands and seals this 8th day of April, 1920.

EDWARD D. LIBBEY,

FRANK MEAD,

H. T. SINCLAIR.

State of California,
County of Ventura—ss.

On this 8th day of April, 1920, before me, John J. Burke, a Notary Public in and for the County of Ventura, State of California, personally appeared Edward D. Libbey, Frank Mead, and H. T. Sinclair, known to me to be the persons whose names are subscribed to the within instrument, and severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal this 8th day of April, 1920.

[Seal] JOHN J. BURKE,
Notary Public in and for the County of Ventura,
State of California. [24]

Original

958

Articles of Incorporation
of
Ojai Mutual Water Company

Filed May 22, 1920

L. E. Hallowell, Clerk

Robert M. Clarke

918 Merchants National Bank
Building
Los Angeles, California [25]

EXHIBIT "B"

958

Frank C. Jordan,
Secretary of State.

Robert V. Jordan,
Assistant Secretary of State.

Frank H. Cory,
Charles J. Hagerty,
Deputies.

State of California, Department of State

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in my office of which it purports to be a copy, and that the same is a full, true and correct copy thereof. I further certify that this authentication is in due form and by the proper officer.

In Witness Whereof, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 28th day of September, 1935.

[Seal]

FRANK C. JORDAN,
Secretary of State;

By CHARLES J. HAGGERTY,
Deputy.

Filed: Sept. 30, 1935. L. E. Hallowell, Clerk; By Irene Van Fossen, Deputy Clerk. [26]

Certificate of Amendment of Articles of Incorporation of Ojai Mutual Water Company a Corporation

The undersigned, H. T. Sinclair and Douglas E. Burns, do hereby certify that they are, respectively, and have been at all times herein mentioned, the duly elected and acting Vice President and Secretary of Ojai Mutual Water Company, a California corporation, and further, that

One: At a regular meeting of the Board of Directors of said corporation duly held at its principal office for the transaction of business at Ojai, California, at 2:30 o'clock p.m. on the 4th day of March, 1935, at which meeting there was at all times present and acting a quorum of the members of said Board, the following resolution was duly adopted:

“Resolution on Amendment of Articles
of Incorporation

“Whereas, it is deemed by the Board of Directors of this corporation to be to its best interests and to the best interests of its shareholders that its Articles of Incorporation be amended to provide that any stockholder desiring to use and using water of the corporation shall be the owner of at least one share of the capital stock of the corporation for each acre of land or fraction thereof, to which said water is to be delivered for use thereon instead of one share for each one-quarter acre of land or fraction thereof, and

“Whereas, it appears to the Board that at the regular annual meeting of the stockholders of the

corporation this day held, at which meeting 1740 shares of the corporation were duly represented out of a total of 2,003 shares of such stock issued and outstanding, a resolution was unanimously adopted by which such Amendment was adopted and approved by the stockholders of the corporation.

“Now Therefore, Be It Resolved that that portion of Article Second of the Articles of Incorporation of this corporation which reads as follows, to wit:

“‘Provided that any stockholder desiring to use and using said water shall be the owner of one share of the capital stock of the company for each one-quarter acre of land, or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above-described property and that [27] such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the By-Laws of the company may determine. Mere ownership of stock in said company or of land situated within the above-described limits shall not entitle a stockholder to any water whatsoever unless he and his land shall be otherwise eligible’ be amended to read as follows:

“‘Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above described

property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the By-Laws of the Company may determine. Mere ownership of stock in said company or of land situated within the above described limits shall not entitle a stockholder to any water whatever unless he and his land shall be otherwise eligible.'

"Resolved Further that the Board of Directors of this corporation hereby adopts and approves this said amendment of its Articles of Incorporation, and

"Resolved Further that the President or a Vice President and the Secretary or an Assistant Secretary of this corporation be and they are hereby authorized and directed to sign and verify by their oaths and to file a certificate in the form and manner required by Section 362b of the California Civil Code, and in general to do any and all things necessary to effect said amendment in accordance with said Section 362b."

Two: At the regular annual meeting of the shareholders of said corporation duly held at its said principal office for the transaction of business, at 2:00 o'clock p.m. on the 4th day of March, 1935, the following resolutions were duly adopted:

"Resolution Adopting and Approving
Amendment of Articles of Incorporation

"Whereas, it is deemed by the shareholders of this corporation to be to its and to their best interests

that its Articles of Incorporation be amended to provide that any stockholder desiring to use and using water of the corporation shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof, to which said water is to be delivered for use thereon instead of one share for each one-quarter acre of land or fraction thereof.

“Now, Therefore, Be It Resolved that that portion of Article Second of the Articles of Incorporation of this corporation which reads as follows, to wit: [28]

“‘Provided that any stockholder desiring to use and using said water shall be the owner of one share of the capital stock of the company for each one-quarter acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the By-Laws of the company may determine. Mere ownership of stock in said company or of land situated within the above described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible’ be amended to read as follows:

“‘Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for

each acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the By-Laws of the company may determine. Mere ownership of stock in said company or of land situated within the above described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible.'

"Resolved Further that the shareholders of this corporation hereby adopt and approve said Amendment of its Articles of Incorporation."

Three: The foregoing amendment was adopted at said shareholders' meeting by the total vote of 1740 shares.

Four: The total number of shares of said corporation entitled to vote on or consent to the adoption of such amendment is 2003.

In Witness Whereof, the undersigned have executed this certificate of amendment this 12th day of July, 1935.

[Seal]

H. T. SINCLAIR,

Vice President of Ojai Mutual
Water Company.

DOUGLAS E. BURNS,

Secretary of Ojai Mutual
Water Company. [29]

State of California,
County of Ventura—ss.

H. T. Sinclair and Douglas E. Burns, being first duly sworn, each for himself deposes and says:

That H. T. Sinclair is and was at all of the times mentioned in the foregoing Certificate of Amendment, the Vice-President of Ojai Mutual Water Company, the California corporation therein mentioned, and Douglas E. Burns is, and was at all of said times, the Secretary of said corporation, and each has read said Certificate and that the statements therein made are true of his own knowledge, and that the signatures purporting to be the signatures of said Vice-President and said Secretary thereto are the genuine signatures of said Vice-President and Secretary, respectively.

H. T. SINCLAIR,

DOUGLAS E. BURNS.

Subscribed and sworn to before me this 12th day of July, 1935.

[Seal] WILLIAM J. BURKE,
Notary Public, in and for said County of Ventura,
State of California. [30]

EXHIBIT "C"

State of California Department of State

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Incorporation of the Ojai Valley Company with the certified copy of the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. I further certify that this authentication is in due form and by the proper officers.

In Witness Whereof, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 19th day of October, A.D., 1922.

[Seal]

FRANK C. JORDAN,
Secretary of State,

By FRANK H. CORY,
Deputy. [31]

United States of America, State of Ohio,
Office of the Secretary of State

I, Harvey C. Smith, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and cor-

rect, of the Articles of Incorporation of the Ojai Valley Company, filed in this office on the 7th day of September, A.D., 1922, and recorded in Volume 284, page 377, of the Records of Incorporations.

Witness my hand and official seal, at Columbus, this 7th day of September, A.D., 1922.

[Seal] HARVEY C. SMITH,
Secretary of State. [32]

These Articles of Incorporation of
The Ojai Valley Company

Witnesseth, That we, the undersigned all of whom are citizens of the State of Ohio, desiring to form a corporation, for profit, under Section 8728-1 et seq. of the General Code, do hereby certify:

First: The name of said corporation shall be The Ojai Valley Company.

Second: Said corporation is to be located at 920 Spitzer Building, Toledo, in Lucas County, Ohio, and its principal business there transacted.

Third: Said corporation is formed for the purpose of purchasing, improving, developing, holding and enjoying real estate in fee simple, upon ground rent or lease, and leasing, mortgaging and selling the same in such parts or parcels, improved or unimproved, and at such terms as to time and manner of payment as may be agreed upon and erecting, managing, caring for and maintaining, extending and altering buildings thereon and purchasing and selling the same.

Fourth: The total number of authorized shares which may be issued by the corporation is Forty-five Hundred shares, of which Fifteen Hundred shares shall be common stock without nominal or par value, and Three Thousand shares shall be preferred stock of the par value of \$100.00 each.

The common stock shall be divided into classes, as follows:

The common stock shall be of only one class and in the number of fifteen hundred shares and designated as the common stock, with full voting powers without restrictions or qualifications but subject to the rights and preferences of the preferred stock of [33] three thousand shares.

The terms and provisions under which the preferred stock shall be issued are as follows:

There shall be three thousand shares of preferred stock of the par value of \$100.00 each.

The holders of the preferred stock shall be entitled to receive dividends out of the surplus or net profits of the corporation when and as declared by the Board of Directors, payable on the first day of December, March, June and September, of each year, at the rate of six per cent per annum and no more, before any dividend shall be set aside or paid on the common stock. From and after the first day of September, 1923, the dividends on said preferred stock shall be cumulative so that if for any period, the same shall not be paid, the right thereto shall accumulate as against the common stock, and

all arrears so accumulated shall be paid, but without interest, before any dividend shall be paid upon the common stock.

In the event of any liquidation or dissolution or winding up, whether voluntary or involuntary, of the corporation, the holders of the preferred stock shall be entitled to be paid in full the par value of their shares, and any unpaid accrued dividends thereon, but no more, before any amount shall be paid to the holders of the common stock, and after the payment to the holders of the preferred stock of its par amount and the unpaid dividends accrued thereon, the remaining assets shall be distributed to the holders of the common stock.

The holders of preferred stock shall have full voting powers equal with the common stock and shall be entitled to notice of any meetings of stockholders of the company.

On the first day of December, 1922, and on the first day of March, June and September, 1923, and on each said days of each year thereafter, and until all the said preferred stock has been [34] retired or redeemed, all accumulated dividends on the outstanding preferred stock for all previous periods having been declared and become payable and the corporation shall have paid said accumulated dividends for such previous periods or shall have set aside from its surplus or any profits a sum sufficient therefor, and the dividends on the outstanding preferred stock shall have been declared and

become payable on said dates, the Board of Directors shall set aside all remaining surplus for the purchase or redemption of its preferred stock before any dividend shall be declared or paid upon the common stock, and this obligation shall be cumulative.

Upon at least thirty days notice given by mail to the record holders of the preferred stock to be redeemed, the Company may redeem on December 1st, 1922, and on any quarterly dividend paying date or dates thereafter, the whole or any part of the preferred stock by lot or pro rata at One Hundred per cent of the par value thereof, plus dividends accrued or in arrears, by such method as shall be provided from time to time by resolution of the Board of Directors.

Unless with the affirmative vote or written consent of the holders of all the preferred stock then outstanding, the company shall not:

(1) Dispose by sale, consolidation, merger, lease or otherwise of the property and business of the company in their entirety or so dispose of any part as at such disposition would materially reduce the security of the preferred stock, unless the proceeds of such disposition as and when received shall be simultaneously set aside and appropriated and thereafter promptly applied to the retirement of its preferred stock by purchase or redemption as herein provided, or

(2) Create any mortgage or other lien upon its

earnings or property to secure an issue of bonds or otherwise, or

(3) Create any shares of stock having priority over that [35] on a parity with the preferred stock hereby authorized, or change the par value thereof, or

(4) Create or issue or guarantee any bonds, notes, or other evidences of indebtedness.

Fifth: The amount of common capital with which the corporation will begin to carry on business is Fifteen Hundred Dollars (\$1500.00).

In Witness Whereof, we have hereunto set our hands, this 4th day of September, A.D., 1922.

JULIAN H. TYLER,

OSCAR J. SMITH,

C. W. F. KIRKLEY,

ALBERT DOMMANN,

ZELMA HARDING.

The State of Ohio,
County of Lucas—ss.

Personally appeared before me, the undersigned, a Notary Public in and for said county, this 4th day of September, A.D., 1922, the above named Julian H. Tyler, Oscar J. Smith, C. W. F. Kirkley, Albert Dommann, and Zelma Harding, who each severally acknowledged the signing of the foregoing

articles of incorporation to be his free act and deed,
for the uses and purposes therein mentioned.

Witness my hand and official seal on the day and
year last aforesaid.

[Seal] J. B. McMAHON,
Notary Public,
Lucas County, Ohio. [36]

The State of Ohio,
County of Lucas—ss.

I, W. T. Huntsman, Clerk of the Court of Com-
mon Pleas, within and for the county aforesaid,
do hereby certify that J. B. McMahon whose name is
subscribed to the foregoing acknowledgment, as a
Notary Public, was, at the date thereof, a Notary
Public in and for said county, duly commissioned
and qualified, and authorized as such to take such
acknowledgment; and further, that I am well ac-
quainted with his handwriting, and believe that the
signature to said acknowledgment is genuine.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said Court, at Toledo, Ohio,
this 5th day of September, A.D., 1922.

[Seal] W. R. HUNTSMAN,
Clerk,

By H. L. CHOLLETT,
Deputy. [37]

EXHIBIT "D"

State of California Department of State

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in my office of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

In Witness Whereof, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 5th day of July, 1939.

[Seal]

FRANK C. JORDAN,
Secretary of State,

CHAS. J. HAGERTY,
Deputy. [38]

United States of America, State of Ohio,
Office of the Secretary of State

I, Earl Griffith, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Certificate of Amendment to Articles of Incorporation of the Ojai Valley Company, filed in this office on the 20th day of June, A.D., 1939,

and recorded in Volume 465, page 471, of the Records of Incorporation.

Witness my hand and official seal at Columbus, Ohio, this 23rd day of June, A.D. 1939.

[Seal] EARL GRIFFITH,
Secretary of State. [39]

Certificate of Amendment to Articles
of Incorporation of the
Ojai Valley Company

C. J. Wilcox, President, and Frank J. Allen, Assistant Secretary, of The Ojai Valley Company, a corporation heretofore formed to buy or sell real estate by Articles of Incorporation filed in the office of the Secretary of State of the State of Ohio on the 7th day of September, 1922, do hereby certify that the following is a true copy of a resolution of amendment to Articles of Incorporation of said corporation, which was authorized by a writing, dated June 14, 1939, signed by all of the holders of shares of said corporation:

Be It Resolved, that the Articles of Incorporation of The Ojai Valley Company be amended by striking out the Article designated "Second" and inserting in lieu thereof the following:

"Second: Said corporation is to have its principal place of business in the City of Toledo, Lucas County, Ohio;"

Be It Further Resolved, that the Articles of Incorporation of said corporation be amended by

adding to the Articles designated "Third" the following paragraph:

"Notwithstanding anything herein contained, this corporation is organized and operated pursuant to the express powers and provisions contained in the Last Will and Testament of Edward Drummon Libbey, deceased (the same having been duly admitted to probate in the Probate Court of Lucas County, Ohio) for the exclusive benefit of The Toledo Museum of Art, an exempt corporation under the Revenue Laws of the United States; and no part of the net earnings of this corporation shall inure to the benefit of any private shareholder or individuals, and no part of the activities of this corporation shall be carrying on propaganda, or otherwise attempting, to influence legislation;" [40]

Be It Further Resolved, that the Articles of Incorporation of this corporation, which were filed in the office of the Secretary of State of the State of Ohio on the 7th day of September, 1922, and recorded in Volume 284, page 377 of the Records of Incorporation, be, and the same hereby are, amended so that said corporation shall have perpetual succession;

Be It Further Resolved, that a Certificate of Amendment of Articles of Incorporation, signed by the President or Vice President and the Secretary or Assistant Secretary of this corporation, be filed in the office of the Secretary of State of the State of Ohio, as required by law; and that, upon the filing

of said certificate, said Articles of Incorporation shall be amended as herein provided.

In Witness Whereof, C. J. Wilcox, President, and Frank J. Allen, Assistant Secretary of The Ojai Valley Company, have hereunto subscribed their names and caused the seal of said corporation to be affixed this 14th day of June, 1939.

[Seal]

C. J. WILCOX,
President,

FRANK J. ALLEN,
Assistant Secretary. [41]

EXHIBIT "E"

That real property containing 15.988 acres more or less in the County of Ventura, State of California, as described and set forth in that Deed to William Alfred Lucking, dated June 14, 1929, and recorded in Book 268 at page 453, Official Records of Ventura County, on July 27, 1929.

EXHIBIT "F"

That real property containing 33.322 acres more or less in the County of Ventura, State of California, as described and set forth in that Deed to William Alfred Lucking, dated November 13, 1940, and recorded in Book 661 at page 373, Official Records of Ventura County, on September 29, 1942. [42]

EXHIBIT "G"

"A part of Tract Eight (8) as the same is designated and delineated upon that certain map entitled 'The Bard Subdivision of the Rancho Ojai, Tracts as surveyed by Thomas R. Bard, 1867-1870, Ventura County, Cal.,' and recorded in the office of the County Recorder of said Ventura County in Book 5 of Miscellaneous Records (Maps), at page 251½, said real property more particularly described as follows:

"Beginning at a point in the southerly line of Mountain View Road at the northeast corner of that certain parcel of land conveyed to William Alfred Lucking and described as Parcel A in deed recorded in the office of the County Recorder of said Ventura County in Book 661 of Official Records at page 373; thence from said point of beginning:

1st. North 70° 05' East 91.00 feet along the southerly line of said Mountain View Road to the northwest corner of that certain parcel of land as conveyed to the Ojai Mutual Water Company by deed recorded in the office of the County Recorder of said Ventura County in Book 379 of Official Records at page 151; thence, along the westerly, southerly and easterly lines of said lands of Ojai Mutual Water Company by the following 3 courses and distances,

2nd. South 0° 25' East 140.16 to a point; thence,

3rd. North 89° 35' East 271.50 feet to a point; thence,

4th. North $0^{\circ} 25'$ West 236.23 feet to a point in the southerly line of said Mountain View Road; thence along same,

5th. North $70^{\circ} 05'$ East 935.72 feet to a point in the westerly line of Fairview Road; thence along the westerly line of said Fairview Road by the following three courses and distances,

6th. South $0^{\circ} 21'$ East 337.10 feet to a point; thence,

7th. South $13^{\circ} 31'$ West 222.00 feet to a point; thence,

8th. South $4^{\circ} 29'$ East 248.48 feet to a point; thence,

9th. North $86^{\circ} 58' 30''$ West 174.78 feet to a point; thence,

10th. Southwesterly 137.97 feet along a curve concave to the left, having a central angle of $39^{\circ} 31' 30''$ and a radius of 200.00 feet to the end of said curve; thence along a tangent to said curve,

11th. South $53^{\circ} 30'$ West 108.00 feet to a point; thence,

12th. Westerly 89.45 feet along a curve concave to the right having a central angle of $41^{\circ} 00'$ and a radius of 125.00 feet to the end of said curve; thence along a tangent to said curve, [43]

13th. North $85^{\circ} 30'$ West 125.00 feet to a point; thence,

14th. Southwesterly 121.47 feet along a curve concave to the left, having a central angle of $58^{\circ} 00'$ and a radius of 120.00 feet to the end of said curve; thence, along a tangent to said curve,

15th. South $36^{\circ} 30'$ West 140.00 feet to a point; thence,

16th. South $39^{\circ} 52' 30''$ West 224.35 feet to a point; thence,

17th. Southwesterly 96.43 feet along a curve concave to the left, having a central angle of $27^{\circ} 37' 30''$ and a radius of 200.00 feet to the end of said curve; thence, along a tangent to said curve,

18th. South $12^{\circ} 15'$ West 13.87 feet to a point; thence,

19th. Southwesterly 60.39 feet along a curve concave to the left, having a central angle of $11^{\circ} 32'$ and a radius of 300.00 feet (the long chord of which bears South $6^{\circ} 29'$ West 60.29 feet), to the northeast corner of Parcel B as described in said deed to William Alfred Lucking; thence, along the northerly line of said Parcel B,

20th. North $81^{\circ} 54'$ West 216.79 feet to the northwest corner of said Parcel B; thence,

21st. North $0^{\circ} 25'$ West 922.85 feet along the easterly line of said Parcel A to the point of beginning and containing 20.82 acres of land."

Receipt of Copy Acknowledged.

[Endorsed]: Filed October 31, 1951. [44]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS UPON
THE GROUND OF A FAILURE TO STATE
A CLAIM UPON WHICH RELIEF CAN
BE GRANTED OR IN LIEU THEREOF
TO REQUIRE THAT THE ACTION BE
STATED IN A SIMPLE, CONCISE AND
DIRECT MANNER

To: William Alfred Lucking, plaintiff above named
and William Alfred Lucking, Esq., and John-
ston & Lucking, Esqs., his attorneys:

You and Each of You Will Please Take Notice
that the defendants above named will on Monday,
the 14th day of January, 1952, at the hour of 10:00
o'clock a.m. in the court room of the above-entitled
Court, Court Room No. 5, Federal Building, 312
North Spring Street, in the City of Los Angeles,
County of Los Angeles, State of California, or as
soon thereafter as counsel can be heard, separately
move the above-entitled Court for an order dismiss-
ing each and every alleged cause of action set forth
in said First Amended Complaint, to wit: the al-
leged first, second, third, fourth, fifth, sixth and
seventh causes of action, upon the ground that each
and every of said alleged causes of action fail to
state a claim upon which relief can [45] be granted
and also upon the ground that each and every of
said alleged causes of action do not comply with
the requirements of Rule 23(b) 2, Federal Rules of

Civil Procedure, and that by reason thereof the same should be dismissed.

In event said alleged causes of action set forth in said First Amended Complaint are not dismissed by the Court for failure to state a claim entitling plaintiff to relief and/or for failure to comply with said Rule 23(b) 2, Federal Rules of Civil Procedure, the defendants will move the Court separately in lieu thereof for an order directing plaintiff to state each and every of said alleged causes of action in a simple, concise and direct manner.

Said motion will be made as to each defendant separately and said motion will be made upon the grounds above set forth and will be further made and based upon this notice and upon the pleadings, papers, records and files in this action.

Dated December 3, 1951.

/s/ JAMES C. HOLLINGSWORTH,
Attorney for Defendants.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 4, 1951. [46]

[Title of District Court and Cause.]

ANSWER

Come now the defendants, Ojai Mutual Water Company, a corporation, and The Ojai Valley Company, a corporation, and each for itself and not for

the other defendant, and answer the first amended complaint of the plaintiff and each and every alleged cause of action therein set forth and admit, deny and allege as follows:

In Answer to Plaintiff's Alleged First Cause of Action These Answering Defendants Admit, Deny and Allege as Follows:

I.

In answer to Paragraph I thereof deny all and singular, generally and specifically, each and every allegation in said Paragraph I contained. [47]

II.

In answer to Paragraph II defendants are without any information or belief as to whether or not plaintiff is a resident of the County of Washtenaw, State of Michigan, and upon that ground deny that plaintiff is a resident of said County of Washtenaw, State of Michigan.

III.

In answer to Paragraph V, deny that plaintiff was to receive free of charge 99 shares of capital stock, fully paid, of the Ojai Mutual Water Company, but allege that said 99 shares of stock were issued to said plaintiff as a part of the consideration for the purchase of and payment for said land referred to in said Paragraph V in connection with said purchase.

IV.

In answer to Paragraph VI deny all and singular, generally and specifically, each and every allegation in said Paragraph VI contained.

V.

In answer to Paragraph VII these answering defendants deny all and singular, generally and specifically, each and every allegation contained in Subdivision (b) of said Paragraph VII, except that plaintiff did receive Certificate No. 195 for twenty shares of the capital stock of Ojai Mutual Water Company.

VI.

In answer to Paragraph VIII these answering defendants deny that plaintiff received no notice of said intended amendment to said articles of incorporation as required by law, or otherwise, and further deny that no such notice of said intended amendment was given as required by law.

VII.

In answer to Paragraph IX these answering defendants [48] deny all and singular, generally and specifically, each and every allegation in said Paragraph IX contained.

VIII.

In answer to Paragraph X these answering defendants deny all and singular, generally and specifically, each and every allegation in said Paragraph X contained.

IX.

In answer to Paragraph XI deny generally and specifically, all and singular, each and every allegation in said Paragraph XI contained.

X.

In answer to Paragraph XII deny all and singular, generally and specifically, each and every allegation in said Paragraph XII contained, except that it is true that there has never been a stock assessment against the holders of shares of the Ojai Mutual Water Company.

XI.

In answer to Paragraph XIII deny all and singular, generally and specifically, each and every allegation in said Paragraph XIII contained.

XII.

In answer to Paragraph XIV deny that there is a surplus of 1300 shares but admit that The Ojai Valley Company is entitled to vote said shares for directors of said Ojai Mutual Water Company.

XIII.

In answer to Paragraph XV deny all and singular, generally and specifically, each and every allegation in said Paragraph XV contained.

XIV.

In answer to Paragraph XVI deny all and singular, generally and specifically, each and every, allegation therein [49] contained, except that it is true that water levels have been below normal in the Ojai area but are now practically normal and there has never been any failure on the part of Ojai Mutual Water Company to deliver water as required by its consumers.

XV.

In answer to Paragraph XVII deny all and singular, generally and specifically, each and every allegation in Paragraph XVII contained.

XVI.

In answer to Paragraph XVIII deny all and singular, generally and specifically, each and every allegation in Paragraph XVIII contained.

XVII.

In answer to Paragraph XIX deny all and singular, generally and specifically, each and every allegation in said Paragraph XIX contained, except that plaintiff requested of, and suggested to said C. J. Wilcox that he make a gift to plaintiff of said 1300 shares referred to in said Paragraph XIX and that it is true that said C. J. Wilcox gave to plaintiff no definite commitment as to what would be done by The Ojai Valley Company concerning said shares of stock and admit that said C. J. Wilcox refused to accede or submit to the requests or suggestions of plaintiff that said stock be transferred to and made a gift to plaintiff by The Ojai Valley Company.

XVIII.

In answer to Paragraph XX, it is admitted that plaintiff has purchased upwards of \$50,000.00 of property from Mrs. E. D. Libbey personally and from The Ojai Valley Company in said Ojai Valley, but defendants are without any information or belief as to the amount of improvements thereon

and upon that ground deny that plaintiff has made substantial improvements on said real property and further [50] deny that plaintiff has any real or substantial interest or necessity for safeguarding said investments or any of them alleged in said Paragraph XX and/or that there is any necessity for the safeguarding of plaintiff's interests and/or other individual owners of said water company stock who are now grantees of land from the Ojai Valley Company and/or Libbey interests so-called.

In Answer to Plaintiff's Second and Separate Alleged Cause of Action These Answering Defendants, Each for Itself and No Other Defendant, Admit, Deny and Allege as Follows:

I.

In answer to Paragraphs I to XX of plaintiff's alleged first cause of action incorporated by reference in Paragraph I of plaintiff's second and separate alleged cause of action, these answering defendants make the same allegations, admissions and denials made by them to said paragraphs contained in plaintiff's alleged first cause of action and make them a part of this, defendants' answer to Paragraph I of plaintiff's alleged second and separate cause of action as if expressly set out at length herein.

II.

In answer to Paragraph II thereof, these answering defendants deny all and singular, generally

and specifically each and every allegation in said Paragraph II contained.

III.

In answer to Paragraph III thereof, these answering defendants deny all and singular, generally and specifically each and every allegation in said Paragraph III contained.

IV.

In answer to Paragraph IV thereof, these answering defendants deny all and singular, generally and specifically each and every allegation in said Paragraph IV contained. [51]

V.

In answer to Paragraph V thereof, these answering defendants deny all and singular, generally and specifically each and every allegation in said Paragraph V contained.

VI.

In answer to Paragraph VI thereof, these answering defendants deny all and singular, generally and specifically each and every allegation in said Paragraph VI contained.

In Answer to Plaintiff's Third and Separate Alleged Cause of Action These Answering Defendants, Each for Itself and No Other Defendant, Admit, Deny and Allege as Follows:

I.

In answer to Paragraphs I to XX of plaintiff's alleged first cause of action incorporated by refer-

ence in Paragraph 1 of plaintiff's third and separate cause of action as if expressly set out at length the same allegations, admissions and denials made by them to said paragraphs contained in plaintiff's alleged first cause of action and make them a part of this, defendants' answer to Paragraph I of Plaintiff's alleged third and separate cause of action as if expressly set out at length herein.

II.

In answer to Paragraphs II and III thereof these answering defendants deny all and singular, generally and specifically, each and every allegation in said Paragraphs II and III contained.

In answer to Paragraphs I to XX of [52] fendant, Admit, Deny and Allege as Follows:
Alleged Cause of Action These Answering Defendants, Each for Itself and No Other De-

I.

In Answer to Plaintiff's Fourth and Separate plaintiff's alleged first cause of action incorporated by reference in Paragraph I of plaintiff's fourth and separate alleged cause of action, these answering defendants make the same allegations, admissions and denials made by them to said paragraphs contained in plaintiff's alleged first cause of action and make them a part of this, defendants' answer to Paragraph I of plaintiff's alleged fourth and separate cause of action, these answering defendants make herein.

II.

In answer to Paragraphs II, III and IV thereof these answering defendants deny all and singular, generally and specifically, each and every allegation in said Paragraphs II, III and IV contained.

In Answer to Plaintiff's Fifth and Separate Alleged Cause of Action These Answering Defendants, Each for Itself and No Other Defendant, Admit Deny and Allege as Follows:

I.

In answer to Paragraphs I to XX of plaintiff's alleged first cause of action incorporated by reference in Paragraph I of plaintiff's fifth and separate alleged cause of action, these answering defendants make the same allegations, admissions and denials made by them to said paragraphs contained in plaintiff's alleged first cause of action and make them a part of this, defendants' answer to Paragraph I of plaintiff's alleged fifth and separate alleged cause of action as if expressly set out at length herein.

II.

In answer to Paragraphs II, III and IV thereof these answering defendants deny all and singular, generally and specifically, each and every allegation in said paragraphs II, III and IV contained.

In Answer to Plaintiff's Sixth and Separate Alleged Cause of Action These Answering Defendants, Each for Itself and No Other Defendant, Admit, Deny and Allege as Follows:

I.

In answer to Paragraphs I to XX of plaintiff's alleged first cause of action and Paragraphs II and III of plaintiff's alleged fifth cause of action, incorporated by reference in Paragraph I of plaintiff's sixth and separate alleged cause of action, these answering defendants make the same allegations, admissions and denials made by them to said paragraphs contained in plaintiff's alleged first and fifth causes of action and make them a part of this, defendants' answer to Paragraph I of plaintiff's sixth and separate alleged cause of action as if expressly set out at length herein.

II.

In answer to Paragraphs II, III and IV thereof these answering defendants deny all and singular, generally and specifically, each and every allegation in said Paragraphs II, III and IV contained.

In Answer to Plaintiff's Seventh and Separate Alleged Cause of Action These Answering Defendants, Each for Itself and No Other Defendant, Admit, Deny and Allege as Follows:

I.

In answer to Paragraphs I to XX of plaintiff's alleged first cause of action and Paragraphs II, III

and IV of plaintiff's alleged second cause of action, and Paragraphs II and III of the alleged fourth cause of action, and Paragraphs II and III of the alleged fifth cause of action and Paragraphs II and III of the alleged sixth cause of action, incorporated by reference in Paragraph I of plaintiff's seventh and separate alleged cause of action, these answering defendants make the same allegations, admissions and denials made by them to said paragraphs contained in plaintiff's alleged first, second, fourth, fifth and sixth causes of action and make them a part of this, defendants' answer to Paragraph I of plaintiff's seventh and separate alleged cause of action as if expressly set out at length herein.

II.

In answer to Paragraph II thereof admit that plaintiff claims that the defendant The Ojai Valley Company has no right to own, vote or sell said surplus 1300 shares of defendant, Ojai Mutual Water Company, but that said claim of plaintiff is without merit or justification and these defendants deny that there is a surplus of 1300 shares of said stock but that said 1300 shares of stock will be necessary in the future for owners of land within the exterior boundaries of the area subject to water service from Ojai Mutual Water Company, which said area is described and set forth in its articles of incorporation, a copy of which is attached to plaintiff's complaint and marked Exhibit "A."

Defendant, The Ojai Valley Company, admits that it does claim and has the right to vote said shares of stock but denies that it is threatening to

sell said shares of stock, all to the irreparable injury of plaintiff and/or the shareholders of defendant, Ojai Mutual Water Company, who are now users of said water and/or who are grantees of defendant, The Ojai Valley Company and/or the Libbey interests, so-called.

For a Further, Separate and Second Defense and Answer to Plaintiff's First Amended Complaint and Each and Every Alleged Cause of Action Therein Set Forth, These Answering Defendants Allege as Follows, to Wit:

I.

That plaintiff's alleged first, second, third, fourth, fifth, sixth and seventh causes of action set forth in plaintiff's first amended complaint, and each of them, are barred by the provisions of Subdivision 1, Section 337 of the Code [55] of Civil Procedure of the State of California.

For a Further, Separate and Third Defense and Answer to Plaintiff's First Amended Complaint and Each and Every Alleged Cause of Action Therein Set Forth, These Answering Defendants Allege as Follows, to Wit:

I.

That plaintiff's alleged first, second, third, fourth, fifth, sixth and seventh causes of action set forth in plaintiff's first amended complaint, and each of them, are barred by the provisions of Subdivision 1

of Section 339 of the Code of Civil Procedure of the State of California.

For a Further, Separate and Fourth Defense and Answer to Plaintiff's First Amended Complaint and Each and Every Alleged Cause of Action Therein Set Forth, These Answering Defendants Allege as Follows, to Wit:

I.

That plaintiff's alleged first, second, third, fourth, fifth, sixth and seventh causes of action set forth in plaintiff's first amended complaint, and each of them, are barred by the provisions of Subdivision 1 of Section 340 of the Code of Civil Procedure of the State of California.

For a Further, Separate and Fifth Defense and Answer to Plaintiff's First Amended Complaint and Each and Every Alleged Cause of Action Therein Set Forth, These Answering Defendants Allege as Follows, to Wit:

I.

That plaintiff's alleged first, second, third, fourth, fifth, sixth and seventh causes of action set forth in plaintiff's first amended complaint, and each of them, are barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

For a Further, Separate and Sixth Defense and Answer [56] to Plaintiff's First Amended Complaint and Each and Every Alleged Cause of Action Therein Set Forth, These Answering Defendants Allege as Follows:

I.

That ever since on or about the month of February, 1928, the plaintiff has been the owner of certain shares of stock of defendant, Ojai Mutual Water Company, a corporation; that said plaintiff had transferred to him and took title to 32 shares of stock of said defendant, Ojai Mutual Water Company on or about February 23, 1928; that said plaintiff purchased said shares from one, Mrs. Florence Scott Libbey, individually, and not from either of said defendants; that on or about the 26th day of September, 1930, the said plaintiff acquired title to, and purchased 99 shares of the stock of Ojai Mutual Water Company, a corporation, from said Florence Scott Libbey, individually, and not from either of said defendants; that on or about the 12th day of June, 1945, the said plaintiff acquired title to 20 shares of the stock of Ojai Mutual Water Company, a corporation, by purchasing and acquiring the same from the defendant, The Ojai Valley Company, a corporation.

II.

That the purchase of said 32 shares of stock of Ojai Mutual Water Company above referred to and the purchase of said 99 shares of stock of Ojai Mu-

tual Water Company above referred to, were transferred, sold and issued to said plaintiff by reason of the fact that plaintiff had purchased from said Florence Scott Libbey individually, 15.988 acres of land and 33.32 acres of land, all of which said land was at the time of the purchase of the same by said plaintiff, included within the exterior boundaries of the lands described in the Articles of Incorporation of Ojai Mutual Water Company, a [57] corporation. That the total acreage of said lands so purchased by the said plaintiff in connection with the said stock in Ojai Mutual Water Company, acquired by plaintiff as hereinabove set forth, contained approximately 49.208 acres of land, more or less, and plaintiff acquired, by reason of the purchase of said lands as hereinabove alleged, a total of only 131 shares of the capital stock of the defendant, Ojai Mutual Water Company, a corporation, and the said plaintiff has at all times since acquiring said shares of stock in Ojai Mutual Water Company, a corporation, received water service from defendant, Ojai Mutual Water Company, a corporation, to said lands so purchased by plaintiff as hereinabove alleged, under, and by virtue of the bylaws, rules and regulations relating to the furnishing and supplying of water by Ojai Mutual Water Company, a corporation, to plaintiff and other owners of shares of stock in said mutual water company.

III.

That plaintiff further purchased and acquired 20 shares of stock of Ojai Mutual Water Company, a

corporation, on or about the 12th day of June, 1945, from defendant, The Ojai Valley Company, a corporation; that said shares of stock referred to in this paragraph, so acquired by plaintiff, were sold and issued to plaintiff by the defendant, The Ojai Valley Company, by reason of the purchase by plaintiff of 20.92 acres of land lying within the exterior boundaries of the lands described and set forth in the Articles of Incorporation of defendant, Ojai Mutual Water Company, a corporation, and to which the owner thereof would be entitled to receive water service from said defendant, Ojai Mutual Water Company, a corporation, in accordance with its Articles of Incorporation, bylaws, rules and regulations pertaining to the furnishing by it of water to qualified land owners owning lands within the exterior [58] boundaries of the lands described in the Articles of Incorporation of Ojai Mutual Water Company, a copy of which is set up and referred to as Exhibit "A" to plaintiff's first amended complaint.

That the issuance of said 20 shares of stock to said plaintiff was transferred to, paid for, and accepted by plaintiff, from, defendant, The Ojai Valley Company, on a basis of one share of stock per acre of land so purchased and acquired by plaintiff within the exterior boundaries of the land described in the Articles of Incorporation of defendant, Ojai Mutual Water Company, and to which plaintiff would be entitled to receive water from it in pursuance of its Articles of Incorporation, bylaws and

rules and regulations respecting the furnishing of water and the said plaintiff accepted said shares of stock on a basis of one share per acre as herein alleged with full knowledge of the fact that the articles of incorporation of defendant, Ojai Mutual Water Company, had been amended on the 4th day of March, 1935, providing that any stockholder desiring to use water from the Ojai Mutual Water Company shall be the owner of at least one share of the capital stock of said Ojai Mutual Water Company for each acre of land or fraction thereof to which said water was to be delivered or used thereon furnished within the exterior limits of the real property described and set forth in the original articles of incorporation of the defendant, Ojai Mutual Water Company, a corporation.

IV.

That at the time of the amendment to the articles of incorporation of defendant, Ojai Mutual Water Company, the plaintiff was the owner of approximately 49 acres of land, more or less and of 131 shares of the capital stock of defendant, Ojai Mutual Water Company, and at the time, and for [59] several years prior to said amendment of said articles of incorporation, had been receiving water service from defendant, Ojai Mutual Water Company, in accordance with its articles of incorporation, bylaws and rules and regulations pertaining to the delivery of water to holders of its stock and subsequent to said amendment of said articles of incorporation the said plaintiff has continued to re-

ceive water from defendant, Ojai Mutual Water Company, a corporation, for said 49 acres of land, more or less, up until the present time.

V.

That the plaintiff, ever since on or about the 12th day of June, 1945, by reason of the purchase of said 20.82 acres of land as hereinabove alleged, has been receiving and accepting water service from said defendant, Ojai Mutual Water Company, a corporation, in accordance with said amendment to its said articles of incorporation, and without protest, hindrance or objection on the part of plaintiff.

VI.

That plaintiff at all times herein mentioned, has acquiesced in, consented to and accepted water service from defendant, Ojai Mutual Water Company, a corporation, in accordance with its original and amended articles of incorporation and in accordance with its bylaws, rules and regulations respecting the furnishing of water by it to its shareholders; that plaintiff herein has at all times known and been aware of the fact that there is contained within the exterior boundaries of the real property described in the original articles of incorporation of defendant, Ojai Mutual Water Company, approximately 2675 acres of land, all of which said land is qualified and entitled to receive water service from Ojai Mutual Water Company, a corporation, under its original and amended articles of incorporation and the

bylaws, [60] rules and regulations adopted by defendant, Ojai Mutual Water Company relative to the furnishing of water service to qualified owners of land within said area.

VII.

That plaintiff has at all times herein mentioned known and been aware of the fact that there has been a heavy increase in population of the said area subject to water service above referred to and that from time to time various and divers persons, firms and corporations have purchased land within said area subject to water service and that from time to time said persons, firms and corporations have acquired shares of stock in Ojai Mutual Water Company by virtue of their purchase of lands within said area subject to water service, exclusive of lands within said area owned or held by defendants, or either of them; that plaintiff, at all times herein mentioned, has known and been aware of the fact that shares of stock of Ojai Mutual Water Company have been sold to and acquired by individuals, firms and corporations owning land within said service area, which said lands were not acquired from defendant, The Ojai Valley Company, or its grantees, and that said individuals, firms and corporations further acquiring said lands within said service area have been accepting and receiving water service from said defendant, Ojai Mutual Water Company, pursuant to the provisions of its original and amended articles of incorporation as herein referred to and set forth and that said individuals, firms and cor-

porations, have relied upon the continued existence of said water service so being received by them and in reliance thereon have constructed valuable and extensive improvements, agricultural, commercial, industrial and otherwise, within said service area; that with full knowledge of said facts as in this paragraph alleged plaintiff has never protested, objected to, or complained [61] against, the doing of any of said acts by the said defendants, or either of them, in the sale of any of said stock of defendant, Ojai Mutual Water Company, or in the furnishing of said water service as herein set forth, from on or about the 11th day of January, 1928, to on or about the date of the filing of the original complaint in said action, to wit: June 12, 1951, a period of approximately twenty-three years.

VIII.

That furthermore, the said plaintiff at all times herein has known and been aware of the fact that by reason of the progressive and continued growth in population within the service area above referred to, the defendant, Ojai Mutual Water Company, has been compelled to and has expended large sums of money from time to time in order to construct, maintain, and repair the necessary facilities required by it under its original and amended articles of incorporation in order to furnish said water service to the qualified persons, firms and corporations within said service area; that in so doing the said plaintiff has never at any time objected, protested or in any way sought to prevent the con-

tinued water service within said service area and the expenditures necessary to be made by said defendant, Ojai Mutual Water Company, in order to maintain and keep said water service in effect, until the filing of his complaint in this action. That at all times herein mentioned plaintiff has been aware of the fact, or by the exercise of reasonable or ordinary diligence could have acquainted himself with the fact, that it was necessary for said original articles of incorporation of said defendant, Ojai Mutual Water Company, to be amended as hereinabove alleged, by reason of the continued growth existing within said service area in order that additional consumers of water within said service area could be supplied by said water company with water [62] needed by additional and qualified consumers within said area. That the said articles of incorporation of said Ojai Mutual Water Company were amended for the purpose of enabling it to extend its service and facilities within said service area in order to promote the expansion and growth of the said service area described and set forth in the original articles of incorporation of said water company, all of which has at all times been known to plaintiff and all of which plaintiff never complained of or objected to until the filing of his original complaint in this action, to wit: On or about the 12th day of June, 1951.

IX.

That by reason of the foregoing facts and matters hereinabove alleged in defendants' further, sepa-

rate, and sixth defense and answer to plaintiff's amended complaint, plaintiff has been guilty of laches in asserting any right, claim or interest of any kind or nature that he may now have or claim to have against any, or either, of said defendants to prevent or restrain them in any way whatsoever from selling or disposing of said shares of stock now held or owned by defendants, or either of them, in said Ojai Mutual Water Company, a corporation, or to question, claim, or in anywise attempt to have said amendment to said articles of incorporation of said water company declared void, inoperative, ineffective, or otherwise, or to have defendant, The Ojai Valley Company, enjoined, restrained or otherwise prevented from selling or transferring any shares of stock owned or held by it in said defendant, Ojai Mutual Water Company; or that said shares of stock shall be limited to 200 acres, or any other acreage now owned by defendant, The Ojai Valley Company, within the area embraced in said water service area as hereinabove set forth and described; or that defendant, The Ojai Valley [63] Company, be in anywise restrained or enjoined from voting more than one share of stock in said mutual water company to unsold land now alleged to be owned by the defendant, The Ojai Valley Company, not exceeding 200 acres; or that defendant, The Ojai Valley Company, be enjoined or restrained from voting more than one share of stock of Ojai Mutual Water Company for every acre of land owned by the defendant, The Ojai Valley

Company, within said service area; or that said defendant, The Ojai Valley Company, deliver up 1300 shares, or any other number of shares of stock of defendant, Ojai Mutual Water Company, to the officers of said defendant mutual water company for retirement of said shares, or otherwise; or that the defendant mutual water company deliver up for cancellation 1300 shares, or any other shares of the stock of said defendant, Ojai Mutual Water Company; or that defendant, The Ojai Valley Company be ordered to distribute 1300 shares of the capital stock of said mutual water company pro rata on an acreage basis to present holders of record of shares of the capital stock of said Ojai Mutual Water Company, and which owners of said shares are now owners of land granted to them by defendant, The Ojai Valley Company, or the so-called Libbey interests, and which are within said service area; or that it be adjudged that the record holders of 1300 shares of stock of Ojai Mutual Water Company, or any other shares therein, have no right to make any profit of any kind or nature of or from said 1300 shares, or any other shares in said mutual water company; or that the court take an accounting of any moneys owing for said Ojai Mutual Water Company plant and if a balance in favor of the Ojai Valley Company be found that its payment be provided for in some equitable manner, which leaves control of said Ojai Mutual Water Company in the grantees of defendant, The Ojai Valley Company; or that in the alternative that a declaratory judgment be entered adjudging and [64] adjudicat-

ing the respective rights and duties of plaintiff and defendants in the premises and/or declaring and/or determining that defendant, The Ojai Valley Company is not entitled to vote, sell or make a profit of any kind or nature of or from any surplus 1300 shares, or any other shares of said mutual water company.

For a Further, Separate and Seventh Defense and Answer to Plaintiff's First Amended Complaint and Each and Every Alleged Cause of Action Therein Set Forth, These Answering Defendants Allege as Follows:

I.

These answering defendants repeat and reallege each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII, and VIII of defendant's further, separate and sixth defense and answer to plaintiff's first amended complaint and make them a part of this, defendants' further, separate and seventh defense and answer to plaintiff's first amended complaint and each and every alleged cause of action therein set forth, as if expressly set out at length herein.

II.

That by reason of the facts and matters aforesaid alleged, the plaintiff is estopped from claiming or asserting any right on plaintiff's part, or on the part of any shareholder or stockholder of said defendant, Ojai Mutual Water Company, as against the said defendants, or either of them, by reason of

anything alleged and set forth in plaintiff's first amended complaint and in each and every alleged cause of action therein set forth or for any relief prayed for by plaintiff in the prayer of his first amended complaint, or otherwise.

For a Further, Separate and Eighth Defense and Answer to Plaintiff's First Amended Complaint and Each and Every Alleged Cause of Action Therein Set Forth, These [65] Answering Defendants Allege as Follows:

I.

These answering defendants repeat and reallege each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII and VIII of defendants' further, separate and sixth defense and answer to plaintiff's first amended complaint and make them a part of this, defendants' further, separate and eighth defense and answer to plaintiff's first amended complaint and each and every alleged cause of action therein set forth, as if expressly set out at length herein.

II.

That by reason of the facts and matters aforesaid alleged plaintiff has waived any right on his part, to claim or assert any right on his part, or on the part of any stockholder or shareholder of said defendant, Ojai Mutual Water Company, as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's first amended complaint and in each and every alleged

cause of action therein set forth, or for any relief prayed for by plaintiff in the prayer of his first amended complaint, or otherwise.

For a Further, Separate and Ninth Defense and Answer to Plaintiff's First Amended Complaint and Each and Every Alleged Cause of Action Therein Set Forth, These Answering Defendants Allege as Follows:

I.

These answering defendants repeat and reallege each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII and VIII of defendants' further, separate and sixth defense and answer to plaintiff's first amended complaint and make them a part of this, defendants' further, separate and ninth defense and answer to plaintiff's first amended complaint and each and every alleged cause of action therein set forth, [66] as if expressly set out at length herein.

II.

That by reason of the facts and matters aforesaid alleged plaintiff has acquiesced in and consented to the various acts and things done by these answering defendants as herein alleged and set forth and is now prevented from claiming or asserting any right on his part, or on the part of any shareholder or stockholder of said Ojai Mutual Water Company, as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's first amended complaint, and in each

and every alleged cause of action therein set forth, or for any relief prayed for by plaintiff in the prayer of his first amended complaint, or otherwise.

Wherefore, these answering defendants demand judgment:

1. That plaintiff take nothing by reason of his first amended complaint and each and every alleged cause of action therein set forth;

2. That it be adjudged and decreed that plaintiff's complaint and each and every cause of action therein set forth, is barred by the provisions of Subdivision 1 of Section 337, Code of Civil Procedure; Subdivision 1 of Section 339, Code of Civil Procedure; Subdivision 1 of Section 340, Code of Civil Procedure, and Section 343, Code of Civil Procedure:

3. That it be ordered, adjudged and decreed that plaintiff has been guilty of laches and is not entitled to any relief prayed for in his said first amended complaint, or in any alleged cause of action therein set forth;

4. That it be ordered, adjudged and decreed that plaintiff is estopped from claiming or asserting any right on plaintiff's part, or on the part of any shareholder or stockholder of said defendant, Ojai Mutual Water Company, as against the said defendants, or either of them, by reason [67] of anything alleged and set forth in plaintiff's first amended complaint and in each and every alleged cause of action therein set forth;

5. That it be further ordered, adjudged and decreed that plaintiff has acquiesced and consented to all of the acts on the part of said defendants, or either of them, complained of by plaintiff, and that he has waived any right to complain of the same as against defendants, or either of them;

6. For defendants' costs of suit incurred herein and for such other and further relief as the Court may deem just and equitable in the premises.

/s/ JAMES C. HOLLINGSWORTH,
Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 21, 1952. [68]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION, UNDER RULE
36, RULES OF CIVIL PROCEDURE FOR
THE DISTRICT COURTS OF THE
UNITED STATES

Plaintiff William Alfred Lucking requests defendants, Ojai Mutual Water Company, a corporation, and The Ojai Valley Company, a corporation, within 15 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, copies of which are exhibited with this request or attached

as exhibits to plaintiff's First Amended Complaint, is genuine.

Exhibit "A," Articles of Incorporation of Ojai Mutual Water Company, being Exhibit "A" attached to plaintiff's First Amended Complaint and being part of the record of this action.

Exhibit "B," Certificate of Amendment of Articles of Incorporation of Ojai Mutual Water Company, a corporation, being [69] Exhibit "B" attached to plaintiff's First Amended Complaint and being a part of the record of the above-entitled action. (Plaintiff herein expressly reserving his right to challenge the validity of said amendment and the regularity of passage and adoption thereof.)

Exhibit "C," Articles of Incorporation of The Ojai Valley Company, being Exhibit "C" attached to plaintiff's First Amended Complaint and being a part of the record of the above-entitled action.

Exhibit "D," Certificate of Amendment to Articles of Incorporation of The Ojai Valley Company, being Exhibit "D" attached to plaintiff's First Amended Complaint and being part of the record of the above-entitled action.

Exhibit "E," letter from plaintiff William Alfred Lucking to Mr. C. J. Wilcox, President, Ojai Mutual Water Company, dated September 29, 1948, a copy of which is attached hereto and marked Exhibit "E."

Exhibit "F," letter from C. J. Wilcox, on The Ojai Valley Company letterhead, addressed to Mr. William A. Lucking in Detroit, Michigan, dated October 4, 1948, a copy of which is attached hereto and marked Exhibit "F."

Exhibit "G," letter from plaintiff William Alfred Lucking to Mr. C. J. Wilcox, Ojai Valley Company, Toledo, Ohio, dated May 24, 1949, a copy of which is attached hereto and marked Exhibit "G."

Exhibit "H," letter from C. J. Wilcox, on The Ojai Valley Company letterhead, to Mr. William A. Lucking, Detroit, Michigan, dated May 27, 1949, a copy of which is attached hereto and marked Exhibit "H."

Exhibit "I," letter from plaintiff William Alfred Lucking to Mr. C. J. Wilcox, Toledo, Ohio, dated April 27, 1950, a copy of which is attached hereto and marked Exhibit "I." [70]

Exhibit "J," letter from C. J. Wilcox, on The Ojai Valley Company letterhead, to Mr. William Alfred Lucking, Detroit, Michigan, dated May 3, 1950, a copy of which is attached hereto and marked Exhibit "J."

Exhibit "K," letter from C. J. Wilcox, on The Ojai Valley Company letterhead, to Mr. William Alfred Lucking, Detroit, Michigan, dated May 24, 1950, a copy of which is attached hereto and marked Exhibit "K."

2. That each of the following statements is true:

(1) The question which is the subject of this action is one of common and general interest to all of the holders of the capital stock of Ojai Mutual Water Company.

(2) Common questions of law and fact are involved affecting the rights of stockholders of Ojai Mutual Water Company, in subject action.

(3) Holders of stock of Ojai Mutual Water Company are so numerous that it is impracticable to bring them all before the Court in subject action.

(4) In negotiations leading up to the purchase of the twenty acres, more or less, east of Del Norte Road, in 1945, plaintiff requested that The Ojai Valley Company transfer to him four shares of stock in Ojai Mutual Water Company per acre.

(5) Mr. C. J. Wilcox refused plaintiff's request, as aforesaid, on the ground that said shares would make the purchase price of said twenty acres, more or less, on entirely too low a basis.

(6) Plaintiff was not given notice of the intended Amendment to the Articles of Incorporation of Ojai Mutual Water Company, Exhibit "B" of plaintiff's First Amended Complaint.

(7) No notice of said intended Amendment (Exhibit "B") was given as required by law.

(8) From 1922 through 1948, The Ojai Valley Company and [71] Mr. and Mrs. Edward D. Libbey sold approximately 300 acres of land for residence purposes, in the Ojai Valley.

(9) Purchasers of the aforesaid 300 acres of land erected residences and other improvements on said land in a total fair market value of over one and one-half million dollars.

(10) The entire cost of all property and facilities of Ojai Mutual Water Company has been paid for from water dues collected by Ojai Mutual Water Company from actual users of Ojai Mutual Water Company water.

(11) There has never been any water used on lands within the water district by virtue of ownership of at least 1400 issued and outstanding shares of Ojai Mutual Water Company, which said 1400 shares or more are now held by The Ojai Valley Company.

(12) No owner of said more than 1400 shares, as aforesaid, has ever paid any water dues in connection with any of said more than 1400 shares.

(13) The Ojai Valley Company now owns less than 200 acres of land eligible to receive water from Ojai Mutual Water Company.

(14) Ojai Mutual Water Company facilities constitute the only adequate and sufficient source of water to shareholders of Ojai Mutual Water Company who are grantees of The Ojai Valley Company or Mr. or Mrs. Edward D. Libbey.

(15) An adequate and sufficient supply of water is necessary to maintain the homes and lands and the value thereof of the grantees of The Ojai Valley Company and Mr. and Mrs. Edward D. Libbey.

(16) The water supply in the Ojai Valley generally is critically short.

(17) The water supply in the basin from which Ojai Mutual Water Company pumps its water is critically short. [72]

(18) On or about June 1, 1951, the static water levels in Ojai Mutual Water Company wells were approximately 100% lower than they were three years prior thereto.

(19) On or about June 1, 1951, the drawdown levels in Ojai Mutual Water Company wells were approximately 100% lower than they were three years prior thereto.

(20) There was not sufficient water available to Ojai Mutual Water Company distribution system to permit the extension of said system without diminishing the amounts of water available to users of water of Ojai Mutual Water Company during the month of September, 1951.

(21) Ojai Mutual Water Company, through its Board of Directors, declared it advisable and necessary to attempt to drill a new well because of the water shortage, during the year 1951.

(22) The entire cost of all property and facilities of Ojai Mutual Water Company, as of date of filing plaintiff's First Amended Complaint, did not exceed \$100,000.00, or approximately \$50.00 per share.

(23) The Ojai Valley Company has offered to

sell substantially all of its more than 1400 shares of Ojai Mutual Water Company stock.

(24) The Ojai Valley Company has sold shares of stock of Ojai Mutual Water Company at a price of \$75.00 per share.

(25) The Ojai Valley Company has sold shares of stock of Ojai Mutual Water Company at a price of \$100.00 per share.

(26) Plaintiff requested of Mr. C. J. Wilcox that approximately 1250 surplus shares of Ojai Mutual Water Company stock be cancelled or placed in trust for the benefit of owners of land who were presently shareholders and users of said water, said demand having been made during the year 1950.

(27) Plaintiff at that time told Mr. C. J. Wilcox that [73] serious injury and loss would result to the present stockholders who were users of water if said Ojai Mutual Water Company stock were sold or transferred.

(28) Plaintiff requested of Mr. C. J. Wilcox, during the year 1950, that said surplus of 1250 shares more or less be purchased and retired into Ojai Mutual Water Company's treasury, upon proper terms.

(29) Mr. Edward D. Libbey was the promoter of both of defendant corporations.

(30) The Ojai Valley Company was, until the death of Mr. Edward D. Libbey, wholly owned by Mr. Libbey and his immediate family.

(31) The Ojai Valley Company, after Mr. Edward D. Libbey's death, was and is now wholly owned by the trustees appointed under Mr. Libbey's Will and/or by Mr. Libbey's immediate family.

(32) None of the present individual users of Ojai Mutual Water Company water is an overlying owner of said water.

(33) Water distributed by Ojai Mutual Water Company is imported upwards of two miles from the so-called Ojai Valley Basin, an underground source, to distributees of said water.

(34) There are numerous users of water from said Ojai Valley Basin, other than Ojai Mutual Water Company and its distributees.

(35) Said Ojai Valley Basin is now seriously depleted and overdrawn.

(36) There was insufficient water in said Ojai Valley Basin for any material extension of water use, over withdrawals from said Basin during the month of September, 1951.

(37) This plaintiff and present shareholders of Ojai Mutual Water Company who are using Ojai Mutual Water Company waters have made actual beneficial use of said waters.

(38) All of Ojai Mutual Water Company's properties and [74] facilities have been paid for by the actual users of said water.

(39) During the summer of 1951, Ojai Mutual Water Company imposed some system of water

rationing, by request or otherwise, upon at least one user of Ojai Mutual Water Company water.

(40) The Ojai Valley Company has purchased no additional land in the Ojai Valley since 1930.

(41) The Ojai Valley Company, by its agents, officers, and employees, has represented to prospective purchasers of Arbolada Tract land that there was a good and adequate water supply available to said land from Ojai Mutual Water Company.

(42) Such representations constitute an established and frequently used "sales talk" to such prospective purchasers.

Dated: July 8, 1952.

WILLIAM ALFRED LUCKING,
and JOHNSTON & LUCKING,
Attorneys for Plaintiff.

By /s/ WM. A. LUCKING, JR. [75]

EXHIBIT "E"

September 29, 1948.

Mr. C. J. Wilcox,
President, Ojai Mutual Water Company,
Care Estate of Edward D. Libbey, Deceased,
Nicholas Building,
Toledo, Ohio.

Dear Mr. Wilcox:

Unless you advise otherwise, I am assuming that you have written Mr. Harmon about my intention of

locking the gate on Del Norte Road as I discussed it with you last Friday.

Regarding the affairs generally of the Ojai Mutual Water Company, and being its second largest stockholder, I would greatly appreciate information and your advice on the following:

1st—Detailed description and boundaries of the original water district, so-called, referred to in the Charter and By-Laws and in the minutes of the first Directors meetings. I would like to have a copy of the plan or map therein referred to, for my files here.

2nd—The balance remaining unpaid of the cost of the Water Company facilities and property which Mr. Libbey, in his lifetime and his representatives later on, advanced to the Company for which, as I understand our talk, the Trustees now are holding as security, approximately 1509 shares out of the total of 2003 shares now issued and outstanding.

In view of the serious fire loss in Ojai, recently, I was greatly reassured by your statements to us Friday, September 17th, that the Trustees still held these 1509 shares undisposed of in any way and for the purposes of the Water Company and the service by it to the original territory contemplated by its organization.

It does not seem to me advisable under any circumstances that the original Water District or area be enlarged in any way or extent, or any obligation entered into by the Company for water outside

thereof, or to the City of Ojai, or any adjoining community. It is my understanding from our recent talk that no such arrangement exists of any kind with any person; except possibly the limited connection made with an Ojai City fire main on its main street and which arrangement is a verbal one and is revocable by our Water Company at any time.

On the subject of the unpaid balance of advancements made by Mr. Libbey and his representatives to the Company for construction, etc., if you wish me to, I will be glad to come to Toledo and go over the figures, and I would greatly appreciate a further conference with you at an early date, on the question of ultimate disposition of the 'Trustees' present stockholdings in the Mutual Company, since I understand practically all the land in the original Water District of the Company has now been sold by the Trustees. [76]

It is particularly my desire and present position that under no circumstances should control of the Water Company leave, in the future, the present owners and grantees of the properties covered by the original Water District—all of whom now hold only about 500 shares out of the total outstanding of 2003 shares—as of the date of my examination last Spring of the Company's records in Ojai.

Kindly let me hear from you on the foregoing at your earliest convenience and oblige,

Very truly yours,

WILLIAM ALFRED LUCKING.

EXHIBIT "F"

The Ojai Valley Company
715 Nicholas Building
Toledo 4, Ohio

October 4, 1948.

Mr. William A. Lucking,
1407 Ford Building,
Detroit 26, Michigan.

Dear Mr. Lucking:

Your favor of September 29th was duly received.

I have talked to Mr. Harmon about locking the gate on Del Norte Road and he agrees that it should be done, and I will instruct Jimmy, our man, to withdraw his objection. I understand you are going to give him a key to the gate.

There's nothing I can add to what I said to you personally a few days ago regarding the Water Company at Ojai. I have no map of the district; all those papers are in Ojai, in the original minute book. The Water Company has no debt either to the Libbey Estate or the Ojai Valley Company, it having repaid The Ojai Valley Company all moneys borrowed for improvements in the system. The stock held by The Ojai Valley Company is not held as security for any debt owed to it by the Water Company but is the remaining part of the stock originally purchased by Mr. Libbey at the time of the organization of the Water Company and most of it will be needed to transfer to future purchasers

of The Ojai Valley Company properties remaining unsold at Ojai. So far as I know, there has never been any intention of enlarging the original water district and there is no arrangement with the local water company to furnish water for distribution by that company.

With my best regards, I remain

Yours very truly,

C. J. WILCOX.

CJW-FJA [78]

EXHIBIT "G"

May 24, 1949.

Mr. C. J. Wilcox,
Ojai Valley Company,
715 Nicholas Building,
Toledo 4, Ohio.

In Re Ojai Mutual Water Company, etc.

Dear Mr. Wilcox:

Recently, I have reviewed my file on the above subject and our correspondence of some months ago from which it appears that:

(a) I received in your letter of November 8th last a map of the Company's Water District and note your explanatory statement that "There has never been any stock sold or water delivered out-

side of this District. The North line is the forest in which the fire recently occurred.”

(b) In your letter of October 4th last, you stated, as follows:

“There’s nothing I can add to what I said to you personally a few days ago regarding the Water Company at Ojai. I have no map of the district; all those papers are at Ojai in the original minute book. The Water Company has no debt either to the Libbey Estate or The Ojai Valley Company, having repaid The Ojai Valley Company all moneys borrowed for improvements in the system. The stock held by The Ojai Valley Company is not held as security for any debt owed to it by the Water Company but is the remaining part of the stock originally purchased by Mr. Libbey at the time of the organization of the Water Company and most of it will be needed to transfer to future purchasers of The Ojai Valley Company properties remaining unsold at Ojai. So far as I know, there has never been any intention of enlarging the original water district and there is no arrangement with the local water company to furnish water for distribution by that Company.”

(c) The original incorporation or organization papers of the Water Company contemplated and provided that land in the District should be entitled to receive water from the company on the

basis of one share of the Company's stock for each one-quarter acre of land or fraction for which the water was to be delivered for use thereon.

Apparently some years later this share per acre basis was attempted to be altered so as to provide a modified basis of one share for each acre of land in the District, etc.

I am calling the foregoing to your attention in view of my recollection that as of about March 1st of last year, the [79] Company's records showed a total of 2003 authorized shares of which the Ojai Valley Company holds of record 1480 shares and all the purchasers of land in the District a total of 494 shares of which I am the largest holder, namely 151 shares; the Ojai Hotel Company, 100 shares; Sidney Gest, 12 shares, and others in less amounts.

It appears to me from my general information and our talks of last fall that the largest and best part of all the land formerly owned by the Libbey interests, including the Ojai Valley Company within the Water District has now been sold to various individual purchasers, who have erected improvements thereon of considerable total value.

I am unable in view of the foregoing facts to understand why the Ojai Valley Company should now hold nearly three times as much of the Water Company's stock as do all the other individual owners of land with their valuable improvements thereon now have standing in their respective names.

In other words, it seems to me perfectly apparent that the individual owners of the Water stock now totalling some 494 shares should have a much greater interest in the Water Company and its future direction and control than is now seemingly represented by the different holdings of shares outstanding.

This is a matter in which I, and my family, are very much interested and I would appreciate your giving careful consideration to the foregoing and I would like in the next week or ten days to come to Toledo and talk with you about the future of the Water Company, at your convenience.

I will phone you ahead of time so as to come when you can give me some time.

Sincerely yours,

WILLIAM ALFRED LUCKING.

WAL/T [80]

EXHIBIT "H"

The Ojai Valley Company

May 27, 1949.

Mr. William A. Lucking,
Detroit 26, Michigan.

Dear Mr. Lucking:

I have your letter of May 25, and cannot say anything further to you regarding matters referred

to in your letter. We are doing everything possible to supply water during the summer, which is predicted to be a very dry, trying time, and we are devoting our every attention to assuring the furnishing of water to the consumers.

If you come to Toledo there is nothing more I can say to you than I have advised you previously. I will be glad to see you if you wish to come, but fear I cannot be very helpful to you.

With my best regards, I remain

Yours very truly,

C. J. WILCOX. [81]

EXHIBIT "I"

April 27, 1950.

Mr. C. J. Wilcox,
715 Nicholas Building,
Toledo, Ohio.

Dear Mr. Wilcox:

I want to thank you for the very enjoyable luncheon with you yesterday and our visit in the afternoon.

I was especially glad to have your assurance that the Directors of the Ojai Mutual Water Company had a definite and settled policy of not enlarging the present use of the water facilities of the Com-

pany beyond the present stockholders and, of course, such others as might purchase the remaining one hundred eighty odd unsold acres now owned by the Ojai Valley Company.

As I discussed with you yesterday, this policy simply means that approximately 550 shares are now owned by actual owners of residence property in the Arbolada and west hills so-called, and residents on the east side of Foothills Road and the north side of Fairview Road, such as Mrs. Sinclair. There are, of course, a few other owners outside of that approximate square mile, such as Mr. Boyle, The Ojai Valley School, the present owners of the Foothills Hotel property, Mr. George Caldwell, Villanova Prep School and Krotona, etc.

Of the above I was informed recently that Mr. Boyle and Krotona have ceased using any of our Mutual Company's water.

If we assume, as we talked yesterday, that one share is devoted to each unsold acre now owned by The Ojai Valley Company, it results that approximately 750 shares are all that are necessary under the present charter of the Water Company to serve the present land holdings and the holdings of the ultimate purchasers from the Ojai Valley Company of the unsold approximate 180 acres, etc. As I suggested yesterday this would leave a balance of about 1250 shares of the original holdings of the Ojai Valley Company out of a total of 2003 shares—for which there is no necessary use by any other land than the above noted.

In that connection, would you consider that shares held by present non-users, such as Boyle and Krontona might be purchased and retired into the Company's treasury—in addition to the retirement of the above-noted 1250 shares, upon proper terms?

I would appreciate your view whether it might not be advisable at this time for this settled policy of the Water Company's Board not to sell any shares to any other possible users (other than the purchasers of the above-noted 180 acres unsold and belonging to the Ojai Valley Company) to be set forth in a resolution of the [82] Board at an early meeting.

On the other subject discussed with you, I will greatly appreciate a further talk with you later on, after you have had an opportunity to confer with your associates on your Board of Trustees, etc.

Again thanking you for a most enjoyable visit and talk, I am

Sincerely yours,

WILLIAM ALFRED LUCKING.

WAL/T [83]

EXHIBIT "J"

The Ojai Valley Company
715 Nicholas Building
Toledo 4, Ohio

May 3, 1950.

Mr. William Alfred Lucking,
1407 Ford Building,
Detroit 26, Michigan.

Dear Mr. Lucking:

I have received your letter of April 27th.

As I will have to undertake considerable investigation and study, concerning the matters referred to in your letter, including conversations with, and information to, my associates and directors, it will be some little time before I can make a reply to yours.

With my best regards, I remain

Yours very truly,

C. J. WILCOX.

CJW:rc [84]

EXHIBIT "K"

The Ojai Valley Company
715 Nicholas Building
Toledo 4, Ohio

May 24, 1950.

Mr. William Alfred Lucking,
1407 Ford Building,
Detroit 26, Michigan.

Dear Mr. Lucking:

With further reference to your inquiry regarding The Ojai Valley Company and The Ojai Mutual Water Company, I am not disposed to make any recommendations to our Board at this time with respect to the points covered by your letter of April 27th.

Under the present Bylaws of the Water Company, the minimum ownership requirement for the use of water is at least one share for each acre or fraction thereof. Should the unsold land ultimately be platted into lots smaller than one acre and a share of stock sold with the lot, a greater number of shares would be required to fulfill the contracts of sale. It is thus impossible to determine at this time just how many shares will be required for disposition with the lot sales. For this and for other reasons, it is my opinion that there is no occasion to consider any changes.

Should the remaining unsold lots and lands be disposed of in a bulk transaction, the stock of the

Water Company owned by The Ojai Valley Company would be included in the transaction.

As you know, Mr. Harmon has an exclusive contract for the sale of the properties, and I find that this contract applied to a bulk sale. Any negotiations, therefore, should be conducted with Mr. Harmon. It has been his custom to come East for the summer months, and I expect he will be here about the middle of June. If you care to talk about the matter further with Mr. Harmon, I suggest you write to him and I am sure he will be glad to arrange an appointment at your convenience.

Very truly yours,

THE OJAI VALLEY COMPANY,

C. J. WILCOX,
President.

CJW:rc

Receipt of copy acknowledged.

[Endorsed]: Filed July 10, 1952. [85]

[Title of District Court and Cause.]

AMENDED REPLY TO REQUEST FOR ADMISSIONS UNDER RULE 36, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND OBJECTION TO PARTS OF SAID REQUEST, TOGETHER WITH NOTICE OF HEARING OF OBJECTIONS

Come Now the defendants above named and file their amended reply to plaintiff's request to make admissions for the purposes of said action, subject to all objections to admissibility which may be interposed at the trial. Defendants admit the genuineness and due execution of all the documents listed as Exhibits "A," "B," "C" and "D" on pages 1 and 2 of plaintiff's said request, but as to Exhibits "E," "F," "G," "H," "I," "J," and "K" listed and set forth on pages 2 and 3 of said request, defendants admit the genuineness of said Exhibits E, F, G, H, I, J and K, but deny that said Exhibits E, F, G, H, I, J and K, or any of them, are relevant, competent or material on the issues to be tried in said matter.

That said defendants, and each of them, hereby object to the said request of plaintiff for admissions on the part of said defendants, or either of them, as to the truth of any [86] of the statements commencing on line 9, page 3 of said request of plaintiff under subdivisions 1 to 42 inclusive, or either of

them, on the following grounds as hereinafter listed and set forth:

“(1) The question which is the subject of this action is one of common and general interest to all of the holders of the capital stock of Ojai Mutual Water Company.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(2) Common questions of law and fact are involved affecting the rights of stockholders of Ojai Mutual Water Company, in subject action.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(3) Holders of stock of Ojai Mutual Water Company are so numerous that it is impracticable to bring them all before the Court in subject action.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(4) In negotiations leading up to the purchase of the twenty acres, more or less, east of Del Norte Road, in 1945, plaintiff requested that The Ojai Valley Company transfer to him four shares of stock in Ojai Mutual Water Company per acre.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(5) Mr. C. J. Wilcox refused plaintiff's request, as aforesaid, on the ground that said shares would make the purchase price of said twenty acres, more or less, on entirely too low a basis.”

Defendants object to said request for admission on the [87] ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(6) Plaintiff was not given notice of the intended Amendment to the Articles of Incorporation of Ojai Mutual Water Company, Exhibit 'B' of plaintiff's First Amended Complaint.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(7) No notice of said intended Amendment Exhibit ‘B’ was given as required by law.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(8) From 1922 through 1948, The Ojai Valley Company and Mr. and Mrs. Edward D. Libbey sold approximately 300 acres of land for residence purposes, in the Ojai Valley.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(9) Purchasers of the aforesaid 300 acres of land erected residences and other improvements on said land in a total fair market value of over one and one-half million dollars.”

Defendants have no information or belief as to the above statement and upon that ground deny that said statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(10) The entire cost of all property and facilities of Ojai Mutual Water Company has been paid for from water dues collected by

Ojai Mutual Water Company from actual users of Ojai Mutual Water Company water.” [88]

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(11) There has never been any water used on lands within the water district by virtue of ownership of at least 1400 issued and outstanding shares of Ojai Mutual Water Company, which said 1400 shares or more are now held by The Ojai Valley Company.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(12) No owner of said more than 1400 shares, as aforesaid, has ever paid any water dues in connection with any of said more than 1400 shares.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(13) The Ojai Valley Company now owns less than 200 acres of land eligible to receive water from Ojai Mutual Water Company.”

Defendants admit that the above statement is true but object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(14) Ojai Mutual Water Company facilities constitute the only adequate and sufficient source of water to shareholders of Ojai Mutual Water Company who are grantees of The Ojai Valley Company or Mr. or Mrs. Edward D. Libbey.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(15) An adequate and sufficient supply of water is necessary to maintain the homes and lands and the value thereof of the grantees of The Ojai Valley Company and Mr. and Mrs. Edward D. Libbey.” [89]

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(16) The water supply in the Ojai Valley generally is critically short.”

Defendants deny that the above statement is true and object to said request for admission on the

ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(17) The water supply in the basin from which Ojai Mutual Water Company pumps its water is critically short.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(18) On or about June 1, 1951, the static water levels in Ojai Mutual Water Company wells were approximately 100% lower than they were three years prior thereto.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(19) On or about June 1, 1951, the draw-down levels in Ojai Mutual Water Company wells were approximately 100% lower than they were three years prior thereto.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(20) There was not sufficient water available to Ojai Mutual Water Company distribution system to permit the extension of said system without diminishing the amounts of water available to users of water of Ojai Mutual Water Company during the month of September, 1951.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within [90] the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(21) Ojai Mutual Water Company, through its Board of Directors, declared it advisable and necessary to attempt to drill a new well because of the water shortage, during the year 1951.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(22) The entire cost of all property and facilities of Ojai Mutual Water Company, as of date of filing plaintiff's First Amended Complaint, did not exceed \$100,000.00, or approximately \$50.00 per share.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36

and is not pertinent, relevant or germane to the issues of said action.

“(23) The Ojai Valley Company has offered to sell substantially all of its more than 1400 shares of Ojai Mutual Water Company stock.”

Defendants admit that Ojai Valley Company has offered to sell substantially or all its stock but only in connection with the sale of all its lands and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(24) The Ojai Valley Company has sold shares of stock of Ojai Mutual Water Company at a price of \$75.00 per share.”

Defendants have sold 3 shares of stock at \$75.00 per share and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(25) The Ojai Valley Company has sold shares of stock of Ojai Mutual Water Company at a price of \$100.00 per share.”

Defendants have sold shares of stock at a price of \$100.00 per share and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action. [91]

“(26) Plaintiff requested of Mr. C. J. Wilcox that approximately 1250 surplus shares of Ojai Mutual Water Company stock be cancelled or placed in trust for the benefit of owners of land who were presently shareholders and users of said water, said demand having been made during the year 1950.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(27) Plaintiff at that time told Mr. C. J. Wilcox that serious injury and loss would result to the present stockholders who were users of water if said Ojai Mutual Water Company stock were sold or transferred.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(28) Plaintiff requested of Mr. C. J. Wilcox, during the year 1950, that said surplus of 1250 shares more or less be purchased and retired into Ojai Mutual Water Company's treasury, upon proper terms.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(29) Mr. Edward D. Libbey was the promoter of both of defendant corporations.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(30) The Ojai Valley Company was, until the death of Mr. Edward D. Libbey, wholly owned by Mr. Libbey and his immediate family.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(31) The Ojai Valley Company, after Mr. Edward D. Libbey’s death, was and is now wholly owned by the trustees appointed under Mr. Libbey’s Will and/or by Mr. Libbey’s immediate family.” [92]

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(32) None of the present individual users of Ojai Mutual Water Company water is an overlying owner of said water.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36

and is not pertinent, relevant or germane to the issues of said action.

“(33) Water distributed by Ojai Mutual Water Company is imported upwards of two miles from the so-called Ojai Valley Basin, an underground source, to distributees of said water.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(34) There are numerous users of water from said Ojai Valley Basin, other than Ojai Mutual Water Company and its distributees.”

Defendants deny the existence of any Ojai Valley Basin; admit that there are other water users in Ojai Valley other than owners of Ojai Mutual Water Company stock and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(35) Said Ojai Valley Basin is now seriously depleted and overdrawn.”

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(36) There was insufficient water in said

Ojai Valley Basin for any material extension of water use, over withdrawals from said Basin during the month of September, 1951."

Defendants deny that the above statement is true and [93] object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

"(37) This plaintiff and present shareholders of Ojai Mutual Water Company who are using Ojai Mutual Water Company waters have made actual beneficial use of said waters."

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

"(38) All of Ojai Mutual Water Company's properties and facilities have been paid for by the actual users of said water."

Defendants deny that the above statement is true and object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

"(39) During the summer of 1951, Ojai Mutual Water Company imposed some system of water rationing, by request or otherwise, upon at least one user of Ojai Mutual Water Company water."

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(40) The Ojai Valley Company has purchased no additional land in the Ojai Valley since 1930.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

“(41) The Ojai Valley Company, by its agents, officers, and employees, has represented to prospective purchasers of Arbolada Tract land that there was a good and adequate water supply available to said land from Ojai Mutual Water Company.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action. [94]

“(42) Such representations constitute an established and frequently used ‘sales talk’ to such prospective purchasers.”

Defendants object to said request for admission on the ground that it is not within the purview of Rule 36 and is not pertinent, relevant or germane to the issues of said action.

That said request on the part of plaintiff for admissions by said defendants, or either of them, of the matters and things set forth under subdivisions 1 to 42, inclusive, hereinabove specifically set forth, are improper under Rule 36 of the Rules of Civil Procedure for the District Courts of the United States and furthermore that the same are incompetent, irrelevant and immaterial.

Notice Is Further Given that defendants will on the 4th day of September, 1952, at the hour of 10:00 o'clock a.m. in the courtroom of the above-entitled court, or as soon thereafter as counsel can be heard, object to plaintiff's request for admissions under said Rule 36 above referred to on the ground that the requests commencing on Line 9, page 3, under subdivisions (1) to (42), inclusive, except as otherwise denied or admitted, are irrelevant and not within the purview of Rule 36 and upon the records and files of said action; the same being the time and place heretofore fixed by the above-entitled Court for a pre-trial conference or hearing in said matter, and for the inspection of documents under Rule 34 of the above-entitled court.

Dated August 18, 1952.

/s/ JAMES C. HOLLINGSWORTH,
Attorney for Defendants.

Duly Verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 23, 1952. [95]

[Title of District Court and Cause.]

MINUTES OF THE COURT—MARCH 10, 1954

Hon. Ernest A. Tolin, District Judge.

Proceedings:

It Is Ordered that this case is now Consolidated for trial with Case No. 15,804-T Civil, and said trial is set for July 6, 1954, 10 a.m.

It Is Further Ordered that trial date of June 1, 1954, heretofore fixed be, and hereby is now vacated.

EDMUND L. SMITH,
Clerk. [97]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 26th day of May, 1955, before the Court sitting without a jury, William Alfred Lucking and Johnston & Lucking, Esqs., appearing for plaintiff and James C. Hollingsworth, Esq., appearing for defendants and the Court having tried only the issue raised by the pleadings in said cause as to the validity of the amendment to the Articles of Incorporation of the Ojai Mutual Water Company on the 4th day of March, 1935, respecting the giving of notice required by law in order to amend said Articles of Incorporation, and evidence both

oral and documentary having been introduced and the cause submitted for decision, the Court now makes its Findings of Fact as follows: [98]

Findings of Fact

I.

The Court finds that the giving of notice of a regular meeting of said Ojai Mutual Water Company to amend said Articles of Incorporation was required and that said notice was given and that the said Ojai Mutual Water Company performed the conditions necessary to the adoption of said amendment to the Articles of Incorporation on the 4th day of March, 1935.

Conclusions of Law

As conclusions of law from the foregoing Findings of Fact, the Court concludes that the said amendment to the Articles of Incorporation of said Ojai Mutual Water Company on the 4th day of March, 1935, is valid in respect to the giving of notice required by law for the amendment of said Articles of Incorporation.

Let judgment be entered in accordance herewith.

Dated this 28th day of July, 1955.

/s/ ERNEST A. TOLIN,
Judge.

Receipt of Copy acknowledged. [99]

State of California,
County of Ventura—ss.

James C. Hollingsworth being duly sworn, deposes and says: That he personally delivered two copies of the attached Findings of Fact and Conclusions of Law to William A. Lucking, Jr., one of the attorneys for plaintiff on the 3rd day of June, 1955, at 2:30 p.m.; that said William A. Lucking, Jr., stated in substance at said time that he would not approve said Findings of Fact and Conclusions of Law as to form; that in event he decided in the future to so approve the same that he would forward a copy of said Findings of Fact and Conclusions of Law to the Court with his signature endorsed thereon. Further deponent sayeth not.

/s/ JAMES C. HOLLINGSWORTH.

Subscribed and sworn to before me this 3rd day of June, 1955.

[Seal] /s/ DOMINICA STEWART,
Notary Public in and for Said
County and State.

My Commission Expires Feb. 9, 1959.

Lodged June 15, 1955.

[Endorsed]: Filed July 28, 1955. [100]

In the District Court of the United States for the
Southern District of California, Central Di-
vision

No. 13197-T

WILLIAM ALFRED LUCKING,

Plaintiff,

vs.

OJAI MUTUAL WATER COMPANY, a Corpo-
ration and THE OJAI VALLEY COMPANY,
a Corporation,

Defendants.

JUDGMENT RELATIVE TO AMENDMENT TO
ARTICLES OF INCORPORATION OF
OJAI MUTUAL WATER COMPANY

The above-entitled cause came on regularly for trial on the 26th day of May, 1955, before the Court sitting without a jury, William Alfred Lucking and Johnston & Lucking, Esqs., appearing for plaintiff and James C. Hollingsworth, Esq., appearing for defendants, and evidence oral and documentary having been introduced and offered by the respective parties on the issue raised by the pleadings relative to the giving of notice required by law for the amendment to the Articles of Incorporation of Ojai Mutual Water Company on the 4th day of March, 1935, and the Court being fully advised and having signed and filed herein written Findings of Fact and Conclusions of Law, and having directed that judgment be entered accordingly,

It Is Hereby Ordered, Adjudged and Decreed that the amendment to the Articles of Incorporation

of said Ojai Mutual [101] Water Company on the 4th day of March, 1935, is valid in respect to the giving of notice required by law for the amendment of said Articles of Incorporation, and that the Ojai Mutual Water Company performed the conditions necessary to the adoption of said amendment respecting the giving of notice thereof; that defendant, Ojai Mutual Water Company be allowed its costs herein fixed in the amount of \$23.96.

Dated this 28th day of July, 1955.

/s/ ERNEST A. TOLIN,
Judge.

Receipt of Copy acknowledged. [102]

State of California,
County of Ventura—ss.

James C. Hollingsworth being duly sworn, deposes and says: That he personally delivered two copies of the attached Judgment Relating to Amendment to Articles of Incorporation of Ojai Mutual Water Company to William A. Lucking, Jr., one of the attorneys for plaintiff on the 3rd day of June, 1955, at 2:30 p.m.; that said William A. Lucking, Jr., stated in substance at said time that he would not approve said Judgment as to form; that in event he decided in the future to so approve the same that he would forward a copy of said Judgment to the Court with his signature endorsed thereon. Further deponent sayeth not.

/s/ JAMES C. HOLLINGSWORTH.

Subscribed and sworn to before me this 3rd day of June, 1955.

[Seal] /s/ DOMINICA STEWART,
Notary Public in and for Said
County and State.

My Commission Expires Feb. 9, 1959.

Lodged June 15, 1955.

[Endorsed]: Filed July 28, 1955.

Docketed and entered July 28, 1955. [103]

In the District Court of the United States for the
Southern District of California, Central Di-
vision

No. 13197-T

WILLIAM ALFRED LUCKING,
Plaintiff,

vs.

OJAI MUTUAL WATER COMPANY, a Corpo-
ration and THE OJAI VALLEY COMPANY,
a Corporation,
Defendants.

JUDGMENT BARRING THE TAKING OF
FURTHER EVIDENCE AND DISMISSAL
OF COMPLAINT

The above-entitled cause came on regularly for
trial on the 26th day of May, 1955, before the Court

sitting without a jury, William Alfred Lucking and Johnston & Lucking, Esqs., appearing for plaintiff and James C. Hollingsworth, Esq., appearing for defendants and the Court having tried the issue raised by the pleadings respecting the giving of notice of the amendment of the Articles of Incorporation of the Ojai Mutual Water Company on the 4th day of March, 1935, and having rendered judgment thereon and counsel for defendants having moved the Court to bar the taking of further evidence in said cause and for dismissal of the complaint upon the ground that the complaint does not state a claim upon which relief can be granted and upon the further ground that the same is not a class action as pleaded,

It Is Therefore Ordered, Adjudged and Decreed that the [104] said motions of said defendants be and the same are hereby granted and the further taking of evidence in said cause is barred and the said cause hereby dismissed.

Dated this 28th day of July, 1955.

/s/ ERNEST A. TOLIN,
Judge.

Receipt of Copy acknowledged. [105]

State of California,
County of Ventura—ss.

James C. Hollingsworth being duly sworn, deposes and says: That he personally delivered two

copies of the attached Judgment Barring the Taking of Further Evidence and Dismissal of Complaint to William A. Lucking, Jr., one of the attorneys for plaintiff, on the 3rd day of June, 1955, at 2:30 p.m.; that said William A. Lucking, Jr., stated in substance at said time that he would not approve said Judgment as to form; that in event he decided in the future to so approve the same that he would forward a copy of said Judgment to the Court with his signature endorsed thereon. Further deponent sayeth not.

/s/ JAMES C. HOLLINGSWORTH.

Subscribed and sworn to before me this 3rd day of June, 1955.

[Seal] /s/ DOMINICA STEWART,
Notary Public in and for Said
County and State.

My Commission Expires Feb. 9, 1959.

Lodged June 15, 1955.

[Endorsed]: Filed July 28, 1955.

Docketed and entered July 28, 1955. [106]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Ojai Mutual Water Company and The Ojai Valley Company, the Defendant Corporations, and to James C. Hollingsworth, Esq., Their Attorney:

Notice Is Hereby Given that William Alfred Lucking, the plaintiff above named, for himself and for the other class plaintiffs, hereby appeals to United States Court of Appeals for the Ninth Circuit from the final Judgment Barring the Taking of Further Evidence and Dismissal of Complaint entered in this action on July 28, 1955, and from the final Judgment Relative to Amendment to Articles of Incorporation of Ojai Mutual Water Company entered in this action on July 28, 1955.

Dated: August 23, 1955.

WILLIAM ALFRED LUCKING,
and JOHNSTON & LUCKING,

By /s/ WM. A. LUCKING, JR.,
Attorneys for Above Named
Plaintiff.

[Endorsed]: Filed August 24, 1955. [107]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILLIAM ALFRED LUCKING INTENDS TO RELY ON APPEAL

Appellant William Alfred Lucking, for himself and for the other class plaintiffs herein, hereby makes the following statement of points upon which he intends to rely on the appeal taken in the above-entitled matter:

1. The Court erred in its Findings of Fact, to the effect that notice of a regular meeting of Ojai Mutual Water Company to amend its Articles of Incorporation was given and that the said Ojai Mutual Water Company performed the conditions necessary to the adoption of said amendment to the Articles of Incorporation on the 4th day of March, 1935, in that each and all are contrary to the evidence, not supported by sufficient or any evidence, and contrary to law.

2. The Court erred in its Conclusions of Law, to the effect that said Amendment to the Articles of Incorporation of said Ojai Mutual Water Company on the 4th day of March, 1935, is valid in respect to the giving of the notice required by law for the amendment of said Articles of Incorporation, in that each and all are contrary to law, contrary to the evidence, and not supported by the Findings of Fact or any evidence. [113]

3. The Court erred in making its Judgment that the Amendment to the Articles of Incorporation of

said Ojai Mutual Water Company on the 4th day of March, 1935, is valid in respect to the giving of notice required by law for the amendment of said Articles of Incorporation, and that Ojai Mutual Water Company performed the conditions necessary to the adoption of said amendment respecting the giving of notice thereof, in that said Judgment is contrary to law, contrary to the evidence, and not supported by the Findings of Fact or any evidence.

4. The Court erred in granting defendants' motions, and in its Judgment Barring the Taking of Further Evidence and Dismissal of Complaint insofar as it applies to the First, Second, Fourth, Fifth, Sixth and Seventh Causes of Action in the First Amended Complaint in the above-entitled cause, in that the granting of said motions and rendering judgment thereon, are contrary to law, contrary to the evidence, and not supported by the Findings of Fact or any evidence.

5. The Court erred in granting defendants' motions, and in its Judgment Barring the Taking of Further Evidence and Dismissal of Complaint insofar as it applies to the First, Second, Fourth, Fifth, Sixth and Seventh Causes of Action in the First Amended Complaint in the above-entitled cause on the ground that the same is not a class action as pleaded, in that if the action was not a properly pleaded class action, the Court sitting in equity failed to treat as surplusage the allegations pertaining to class actions, and failed to render full and complete relief to plaintiff William

Alfred Lucking in his individual right, which failure is contrary to law and contrary to the evidence.

6. The Court erred in granting defendants' motions, and in its Judgment Barring the Taking of Further Evidence and Dismissal of Complaint insofar as it applies to the First, Second, Fourth, Fifth, Sixth and Seventh Causes of Action in the First Amended Complaint in the above-entitled cause upon the ground that the complaint does not state a claim upon which relief can be granted, in that such Judgment is contrary to law and contrary to the facts properly pleaded and adduced at the trial.

Dated at Ventura, California, this 25th day of October, 1955.

WILLIAM ALFRED LUCKING,
JOHNSTON & LUCKING,

By /s/ WM. A. LUCKING, JR.,
Attorneys for Appellant and
Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 27, 1955. [114]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of Cali-

fornia, do hereby certify that the foregoing pages numbered 1 to 117, inclusive, contain the original

First Amended Complaint;
Notice of Motion to Dismiss, etc;
Answer;
Request for Admission;
Amended Reply to Request for Admission;
Findings of Fact & Conclusions of Law;
Judgment Relative to Amendment, etc.;
Judgment Barring the Taking for Further Evidence, etc.;
Notice of Appeal;
Affidavit for Order Extending Time to Docket Record on Appeal;
Designation of Contents of Record on Appeal;
Statement of Points Upon Which Appellant Intends to Rely;
Defendants' Designation of Additional Portions of Record;

and a full, true and correct copy of the Minute of the Court had on March 10, 1954, which together with the Original copy of Reporter's Transcript (2 vols.) of Proceedings for January 14, 1952, & September 4, 1952, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, the sum of which has been paid by appellant.

Witness my hand and the seal of said District Court, this 15th day of November, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14945. United States Court of Appeals for the Ninth Circuit. William Alfred Lucking, Appellant, vs. Ojai Mutual Water Company, a Corporation and The Ojai Valley Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 16, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14945

WILLIAM ALFRED LUCKING,
Appellant,
vs.

OJAI MUTUAL WATER COMPANY, a Corporation,
and THE OJAI VALLEY COMPANY,
a Corporation,
Appellees.

ADOPTION OF STATEMENT OF POINTS
AND DESIGNATION OF RECORD, PUR-
SUANT TO RULE 17

Appellant above named hereby adopts the Statement of Points Upon Which Appellant William Alfred Lucking Intends to Rely on Appeal, commencing on Page 113 of the original certified record, and the Designation of Contents of Record on Appeal, commencing on Page 110 of the original certified record, heretofore filed with the Clerk of the United States District Court for the Southern District of California, Central Division, as compliance with Rule 17 of the Rules of Practice of United States Court of Appeals for the Ninth Circuit.

Dated: January 10, 1956.

WILLIAM ALFRED LUCKING,
JOHNSTON & LUCKING,
Attorneys for Appellant.

By /s/ WM. A. LUCKING, JR.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 12, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION FOR CONSOLIDATION OF
ACTIONS FOR PRINTING, BRIEFING
AND HEARING

The above-entitled action and another action of the same title having been brought in the District Court of the United States for the Southern District of California, Central Division, and being Nos. 13197 and 15804, respectively, on the Clerk's register of actions of said District Court, and Nos. 14945 and 14946, respectively, on the Clerk's register of actions in the above-entitled Court, and said actions having been consolidated for trial in said District Court and having been tried therein on May 26, 1955, and the exhibits, testimony and other evidence adduced at the trial of said actions and the reporter's transcripts thereof being in many instances identical, and common questions of law and of fact being involved in said actions, and the nominal parties to said actions being the same, and both actions having been appealed to the above-entitled Court.

It Is Therefore Stipulated by and between appellant and appellees in the above-entitled appeals, through their respective counsel, that the above-entitled cases on appeal may be consolidated for printing, briefing and hearing so that duplication of printing may be eliminated, expenses reduced, and time of Court and counsel may be saved.

Dated: February 17, 1956.

WILLIAM ALFRED LUCKING,
JOHNSTON & LUCKING,

By /s/ WM. A. LUCKING,
Attorneys for Appellant.

/s/ JAMES C. HOLLINGSWORTH,
Attorney for Appellees.

So Ordered:

/s/ ALBERT LEE STEPHENS,
Acting Chief Judge, U. S. Court of Appeals for
the Ninth Circuit.

[Endorsed]: Filed March 9, 1956.

No. 14946

United States
Court of Appeals
for the Ninth Circuit

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation,
and THE OJAI VALLEY COMPANY, a Corporation,

Appellees.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 65)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

MAY 18 1955

No. 14946

United States
Court of Appeals
for the Ninth Circuit

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation,
and THE OJAI VALLEY COMPANY, a Corporation,

Appellees.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 65)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	38
Attorneys, Names and Addresses of	1
Complaint	3
Exs. A-G—(Set Out in Full in Cause No. 14945)	38
Certificate by Clerk	61
Judgment Barring the Taking of Evidence and Dismissal of Complaint	57
Minute Order of March 10, 1954	56
Notice of Appeal	59
Statement of Points on Appeal (U.S.D.C.)	59
Statement of Points and Designation of Rec- ord, Adoption of (U.S.C.A.)	63
Stipulation for Consolidation of Actions for Printing, Briefing and Hearing	64

Transcript of Proceedings.....	137
--------------------------------	-----

Witnesses :

Butler, Dr. Charles T.

—direct246

—cross254

Harmon, Rawson B.

—direct217, 227, 256

—cross258

Jackson, Mrs. Eldred

—direct228

Lucking, William Alfred

—direct210

Wilcox, Charles Justus

—direct188, 209

NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

WILLIAM ALFRED LUCKING,
16th Floor, Ford Building,
Detroit 26, Michigan, and
Suite 12, Ventura Theater Building,
620 East Main Street,
Ventura, California.

Attorney for Appellee:

JAMES C. HOLLINGSWORTH,
315 Bank of America Building,
P. O. Box 969,
Ventura, California.

In the District Court of the United States for the
Southern District of California, Central Division

No. 15804-BH

WILLIAM ALFRED LUCKING,

Plaintiff,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation,
and THE OJAI VALLEY COMPANY,
a Corporation,

Defendants.

COMPLAINT

Action for Accounting, Injunctive Relief, and for
Further Relief

Plaintiff complains against defendants on behalf
of himself and on behalf of all other stockholders of
Ojai Mutual Water Company, a California Corporation,
and for cause of action alleges:

I.

That the question which is the subject of this
action is one of common and general interest to all
of the holders of the capital stock of Defendant
Ojai Mutual Water Company, a California corporation,
and common questions of law and fact are
involved affecting the rights of said stockholders of
Ojai Mutual Water Company; that the holders of
said capital stock are so numerous as to make it
impracticable to bring them all before the Court.

II.

Plaintiff is a citizen of the County of Washtenaw in the [2*] State of Michigan, and is of full age and is the owner of upwards of One Hundred (100) shares of the capital stock of the Ojai Mutual Water Company.

III.

(a) Defendant Ojai Mutual Water Company is a corporation duly organized and existing under the laws of the State of California and was incorporated in May, 1920, for the purpose of owning water and water rights in Ojai and vicinity, in Ventura County, and to deliver water to its stockholders only for their exclusive use upon lands owned by them within certain District boundaries.

A copy of the Articles of Incorporation of said Company is attached hereto as Exhibit "A," reference to which is hereby made.

A copy of a Certificate of Amendment to said Articles of Incorporation, dated July 12, 1935, and filed in the office of the Secretary of State on September 2, 1935, is attached hereto as Exhibit "B," reference to which is hereby made.

(b) Defendant The Ojai Valley Company is a corporation duly organized and existing under the laws of the State of Ohio, having been incorporated therein on or about the 4th day of September, 1922, and said The Ojai Valley Company was duly admitted to transact business within the State of Cali-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

fornia, and in particular Ventura County, and has for the last twenty (20) years and upwards been the owner of certain valuable residential and agricultural properties in a district lying west of Foothills Road and south of Fairview Road, within the Ojai Valley, and originally comprising a total of approximately five hundred (500) acres; the greater part of this district being known as Arbolada and West Hills tracts; and that, upon information and belief, Defendant The Ojai Valley Company is now wholly-owned by the Trustees of the Edward D. Libbey Estate, and was wholly-owned by said Edward D. Libbey and his immediate family from time of incorporation till said Mr. Libbey's [3] death.

Copies of the Articles of Incorporation and Certificate of Amendment thereof, of said The Ojai Valley Company, are attached hereto, marked Exhibits "C" and "D," respectively, reference to which is hereby made.

(c) The interests and rights forming the subject matter in controversy exceeds, exclusive of interest and costs, the value of Three Thousand Dollars (\$3,000.00), namely Twenty Thousand Dollars (\$20,000.00) and upwards. This action is not collusive to confer on the Court of the United States Jurisdiction over any action of which it did not otherwise have jurisdiction.

(d) That defendant Ojai Mutual Water Company and defendant The Ojai Valley Company have common directors, and complete voting control of defendant Ojai Mutual Water Company is owned by

defendant The Ojai Valley Company, making useless and of no benefit any demand which plaintiff might make upon defendant The Ojai Valley Company for the relief prayed for herein, particularly in view of the allegations hereinafter contained and for the allegations contained in plaintiff's First Amended Complaint in the action entitled "William Alfred Lucking, Plaintiff, vs. Ojai Mutual Water Company, a Corporation, and The Ojai Valley Company, a corporation, defendants", heretofore filed in this Court and being No. 13197-T.

IV.

That on or about January 11, 1928, plaintiff purchased on land contract from Florence Scott Libbey, a widow, fifteen acres more or less, lying west of Del Norte Road and north of property owned by defendant The Ojai Valley Company and situated in said Ojai Valley, for the sum of Thirty Thousand Dollars (\$30,000.00), and which contract was modified on February 9, 1928, so as to cover 15.988 acres at the same price of Two Thousand Dollars (\$2,000.00) per acre, a description of which land is attached hereto, marked Exhibit "E," reference to which is hereby made. [4]

It was a part of said contract of purchase and sale that, upon completion of the payments therein specified, plaintiff should receive thirty-two (32) shares of said defendant Ojai Mutual Water Company's capital stock, as fully paid, and which thirty-two (32) shares were afterwards, upon completion of said contract, issued and delivered to plaintiff by Certificates for said shares.

V.

That on or about September 26, 1930, plaintiff purchased on land contract from Florence Scott Libbey, a widow, 33.322 acres more or less, of land adjoining said first purchased land, as set forth in paragraph IV hereof, for a total purchase price of Twenty-five Thousand Dollars (\$25,000.00), payable on or before January 1, 1935, as specified.

It was a condition of said last mentioned contract that seller, upon the execution of the contract and the final payments therein specified, should deliver to plaintiff as buyer "free of charge ninety-nine (99) shares of the capital stock, fully paid, of the Ojai Mutual Water Company."

That on or about the 13th day of November, 1940, plaintiff completed said payments of \$25,000.00 and received a grant deed from defendant, The Ojai Valley Company, grantee of said vendor and seller, Florence Scott Libbey, of said 33.322 acres, which was duly recorded on September 29, 1942, in Volume 661 of Official Records, page 373 of Ventura County, and at the same time there was delivered to plaintiff Certificate No. 112, dated September 26, 1930, for said 99 shares of the capital stock of said defendant, Ojai Mutual Water Company. A description of said land is attached hereto and marked Exhibit "F," reference to which is hereby made.

VI.

That at the time of making the aforesaid purchases plaintiff had no knowledge of the contents

of the Articles of Incorporation, [5] Exhibit "A," or of the Amendment thereto, dated July 12, 1935, Exhibit "B."

VII.

That on or about May 21, 1945, plaintiff purchased on land contract from defendant, The Ojai Valley Company, 20.82 acres more or less, bounded by Del Norte and Fairview Roads and Foothills Road in said Ojai Valley, and adjoining said two previous purchases, for the sum of Fifteen Thousand Dollars (\$15,000.00), payable before May 1, 1952, which transaction was completed by the making of said payments on or about the 10th day of June, 1950, at which time plaintiff received a Grant Deed from said land and recorded it June 30, 1950, in Book 938, of Official Records, page 369, of Ventura County, California, a description of which land is attached hereto and marked Exhibit "G," reference to which is hereby made.

VIII.

In summary, plaintiff further shows that said first and second transactions were made and entered into at a time prior to July 12, 1935, when said Amendment to the Articles of Incorporation of said defendant Ojai Mutual Water Company was filed, being Exhibit "B."

That said Amendment reduced the requisite number of shares of said Ojai Mutual Water Company which should be assigned or allocated to each one acre of land to be owned by the stockholders of said

Ojai Mutual Water Company, which Amendment thus substituted "One share per acre" for the previous requirement of the original Articles of Incorporation of "four shares per acre" as provided for by Exhibit "A."

That of the stockholders meeting of said defendant Ojai Mutual Water Company at which this Amendment, Exhibit "B," was authorized, plaintiff received no notice of said intended Amendment to said Articles of Incorporation as required by law; and [6] upon information, no such notice of said intended Amendment was given as required by law.

IX.

Said defendant, Ojai Mutual Water Company's original Articles of Incorporation, being said Exhibit "A," expressly provides and requires that:

"This company is not authorized to engage in the business of selling, dealing in or distributing said or any water for profit, or for compensation, or as a public service corporation, and none of its waters shall ever be for sale, rental or distribution, and for the delivery of said water to them by said company said stockholders shall pay only such an amount as may be sufficient to pay the cost of management, maintenance and operating of the Company and for the delivery of said water to them.

"The company shall deliver said water fairly, impartially and equitably among and to its qualified stockholders desiring said water, so long as they shall observe the rules and regulations defined in the

Bylaws of the Company and prescribed by the board of directors for the use and delivery of said water, and said company is hereby authorized and empowered to prescribe by appropriate bylaws, all needful rules and regulations for the fair and equitable delivery of said water.”

X.

The original Bylaws of said defendant Ojai Mutual Water Company from 1920 until 1935 at least, provide and require, among other matters and things, as follows:

“Article II.

“Board of Directors

“Section 1: Number.

“The corporate powers, business and property of the corporation shall be exercised, conducted and controlled by a board of directors consisting of three persons, or such other increased or decreased number as may be hereafter provided for.

* * *

“Article III.

“Power of Directors

“The directors shall have power:

“1st. To call special meetings of the stockholders when they deem it necessary. And they shall call a meeting at any time, upon the written request of stockholders holding [7] one-fourth of all the capital stock.

“2nd. To appoint and remove, at pleasure, all officers, agents and employees of the corporation, prescribe their duties, fix their compensation, and require from them security for faithful service.

“3rd. To conduct, manage and control the affairs and business of the corporation, and to make rules and regulations, not inconsistent with the laws of the State of California, or the Bylaws of the corporation, for the guidance of the officers and management of the affairs of the corporation.

* * *

“Article X.

“Voting

“At all corporate meetings each stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock, in the manner required by the Civil Code. Such proxy shall be in writing, and filed with the Secretary.

* * *

“Article XIV.

“Concerning Waters of the Company,
Their Management, Delivery and Use

“(A)

“This company was incorporated, as shown by its articles of incorporation, for the following purposes:

“To acquire, hold, manage and control water and water rights and water bearing lands in the vicinity of Ojai, in Ventura County, California, to-

gether with such personal and other real property, easements and appurtenances as may be necessary or convenient to carry out the purposes and objects of the company, and to deliver said water to its stockholders only, for their exclusive use upon lands owned by them or in their lawful possession, situate in Ventura County, California, lying within the exterior boundaries of the following described property:

* * *

“Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for each one-quarter acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above-described property, and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company in such manner as the bylaws of the company may determine. Mere ownership of stock in said company or of land situated with the above-described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible. [8]

“This company is not authorized to engage in the business of selling, dealing in or distributing said or any water for profit, or for compensation, or as a public service corporation, and none of its waters shall ever be for sale, rental or distribution, and for the delivery of said water to them by said company said stockholders shall pay only such an amount as

may be sufficient to pay the cost of management, maintenance and operation of the company and for the delivery of said water to them.

“The company shall deliver said water fairly, impartially and equitably among and to its qualified stockholders desiring said water, so long as they shall observe the rules and regulations defined in the bylaws of the company and prescribed by the board of directors for the use and delivery of said water, and said company is hereby authorized and empowered to prescribe, by appropriate bylaws, all needful rules and regulations for the fair and equitable delivery of said water.

“Each of the above provisions of the articles of incorporation is expressly adopted and made a part of these bylaws, and each and every person now a stockholder of this corporation or to hereafter become a stockholder therein, expressly agrees by the signing of these bylaws to be bound by the provisions contained in said articles of incorporation and by any and all bylaws as contained herein or to be hereafter adopted by the company, and by any rule and regulation of said company passed and adopted by its board of directors for the management thereof and for carrying out the purposes for which said corporation was incorporated.

“(B)

“Pursuant to authorization provided for in the articles of incorporation of this company, these bylaws do now determine that any person desiring to use or using any of the waters of this company

shall be the owner of at least one share of its capital stock for each one-quarter acre of land or fraction thereof, to which water is to be delivered for use thereon, which land shall be situated within the exterior limits of the property described in the articles of incorporation and hereinbefore in these bylaws referred to, and authority is now by these bylaws expressly conferred upon the board of directors of the company to pass and adopt from time to time, by appropriate resolution which shall receive the affirmative vote of two-thirds of the entire board of directors, a schedule or schedules designating and listing such of said lands as are described in the articles of incorporation as the board of directors may deem susceptible by the company and desirable to have admitted to the delivery system of the company, such resolution, when passed and adopted, to be entered at length in the minute book of the company and to show the name of the person or corporation owning or in the lawful occupation of said land to describe the same with sufficient certainty so as to cause said property to be readily identified, and to state the number of shares of stock which the owner thereof shall possess in order to entitle said land to water;

“Provided, However, that before said resolution this designating and listing said lands shall become effective in favor of any person or in favor of any land, such person who [9] is by said resolution designated as the owner thereof, shall have first become the owner of the requisite number of shares of the stock of this company, as indicated in said

resolution, and shall have signed these bylaws and have agreed to be bound by everything contained in the articles of incorporation of the company and in these bylaws, as well as any other bylaws to be hereafter by the company from time to time or at any time adopted.

* * *

“(E)

“The board of directors shall have the power at any time or times hereafter, when it shall appear to them expedient and for the best interests of the company to do so, by resolution passed and adopted at a regular meeting and receiving the approval of two-thirds of the entire board of directors, to make and adopt supplemental schedules, including therein such other lands not already listed as in their judgment can be effectively and advantageously supplied with the waters of the company without interfering with or limiting the supply of water to be furnished to the lands covered by the schedule or schedules in force at that time, and which additional land shall be designated in said supplemental schedule in segregated tracts or parcels.

“The board shall fix and determine in said supplemental schedule the number of shares of stock which each owner of said tract therein mentioned shall hold in order to entitle him and said land to water; provided that the allotment of stock to each of said parcels shall be at the rate of at least one share for each one-quarter acre, or fraction thereof,

* * *

“(G)

“The board of directors shall each year, and prior to the beginning of the season, adopt a schedule of charges to be paid for the delivery of water by it to its stockholders who are qualified to receive the same for use upon land owned by them or in their lawful possession, which charges shall be in such an amount only as shall be necessary to pay the cost of management, maintenance and operation of the company, and for the delivery of the water to the stockholders.

“In determining the amount of said charge, the board of directors is expressly authorized to make the same sufficient to create a fund for renewals and a sinking fund for depreciation, if they shall deem the same advisable.

* * *

“(I)

Whenever the board of directors adopts any schedule or schedules or designates or lists any lands as being reasonably susceptible to irrigation by the company, or fixes or determines the amount of the charges to be made for the delivery of water, or fixes or determines the amount to be paid by the stockholders directly it shall do so by resolution duly passed and adopted, in the manner and at the time as in these bylaws provided for, and shall cause the same to be entered at [10] length in the minute book of the company, which minute book

shall be at all times open to inspection and examination of each of the stockholders of the company."

* * *

XI.

Notwithstanding the plain and unequivocal requirements, stipulations and provisions of said Articles of Incorporation, Exhibit "A" of defendant, Ojai Mutual Water Company, specifying in part, that:

"(a) The Company shall deliver said water fairly, impartially and equitably among and to its qualified stockholders desiring said water * * * and said company is hereby authorized and empowered to prescribe, by appropriate bylaws—all needful rules and regulations for the fair and equitable delivery of said water."

(b) That as purportedly amended, on March 4, 1935, the said Board of Directors of Ojai Mutual Water Company was authorized "to state the number of shares of stock which the owner (of said land) thereof shall possess in order to entitle said land to water" which owner stockholder was further required to

"be the owner of, at least, one share of its capital stock for each quarter acre of land or fraction thereof, to which water is to be delivered for use thereon * * *"

"(c) To adopt a schedule of charges to be paid for the delivery of water by it to its stockholders who are qualified to receive the same for use upon

land owned by them or in their lawful possession, which said charges shall be in such amount only as shall be necessary to pay the cost of management, maintenance and operation of the Company, and for delivery of water to the stockholders.”

“In determining the amount of said charge, the board of directors is expressly authorized to make the same sufficient [11] to create a fund for renewals and a sinking fund for depreciations, if they shall deem the same advisable.” Nevertheless, defendant, Ojai Valley Company, and its officers and directors have, since the year 1935, when it, by its said unlawful and illegal control, so gained over the property, assets and business and affairs of defendant, Ojai Mutual Water Company, as aforesaid, procured and had adopted said purported amendment to its Articles of Incorporation and bylaws, permitting delivery of water to a stockholder of not less than one share to the acre—

thus permitting said defendant Ojai Valley Company to sell all its remaining unsold lands within its original 600 acre area—

to be furnished with said Ojai Mutual Water Company’s water—by selling or giving with each acre sold “not less than one share” of said Water Company’s stock—and thereby, by means of said scheme or device, permitting said Ojai Valley Company to transfer only one share of said Water Company for each acre sold by it, whereas prior to said

amendment, it was required to transfer not less than four of said shares for each acre sold by it,

thereby permitting it to retain over 1200 shares of said Water Company's capital stock—constituting a clear majority of the total 2003 shares outstanding—thus giving said Ojai Valley Company absolute control of said Water Company, and consequently of a large part of the value and worth of the thirty or more Home Owner Stockholders' residences in said 600 acre area.

when said Ojai Valley Company itself has no remaining property susceptible to use of said Water Company's water, and therefore no legitimate use for or purpose in holding said majority of shares of stock.

And further, the formal requirements as to eligibility of water users, as above set forth, have never been observed by [12] said Water Company.

XII.

Therefore, said Ojai Valley Company and its officers and directors—did

by the arbitrary and unlawful and unreasonable and inequitable act, devise and scheme of, in March, 1935, so amending the said Water Company's Articles of Incorporation and Bylaws—

enable itself to sell all its land assets susceptible to the use of said Water Company's Water—and

thereafter retain actual control of said Company's Water Facilities—which control, by about 1300 of

said control shares (out of a total of 2003 shares) said defendant Ojai Valley Company did in about the year 1947 actually offer to sell to this plaintiff for a sum of upwards of \$100,000.00.

XIII.

In the years of 1936 and up to November, 1946, said defendant Ojai Valley Company owned a valuable Country Club and Golf Course Property in Ojai Valley of about 200 acres, and which said Golf Club property had, during said period of upwards of eleven years, actually used a total of upwards of 33,323,000 cubic feet of said Water Companys' water—for which water said Ojai Valley Company only paid a total of \$33,323.00 or at the average rate of ten (10) cents per one hundred cubic feet.

On the contrary, during said eleven-year period, an additional 37,607,000 cubic feet of said Water Company's water was used by the individual Home Owners (who had previously purchased property from said Ojai Valley Company) on their respective Home Properties—and who paid therefor a total of about \$71,660.00—at an actual average rate of about nineteen (19) cents per one hundred cubic feet.

This Water Company transaction over this eleven year period, [13] of furnishing said 33,323,000 cubic feet of said water, at said average cost or charge of ten cents per one hundred cubic feet—for use on said Ojai Golf Club property,

was accomplished and brought about by the sole action of said owner, Ojai Valley Company, and through its said control of said Water Company, as aforesaid, and

by its Board of Directors, consisting of C. J. Wilcox of Toledo and Rawson Harmon of Ojai Valley—who constituted a majority of the Board of Directors of said Ojai Valley Company, and by said control shares in said Water Company were thus enabled to elect themselves from year to year from said 1936 to said 1947—as a majority of the Board of Directors of said Water Company—and thus to fix and set said very favorable water rates for said Ojai Country Club—at least \$30,000 in total more favorable, and less than the same number of cubic feet of water would have been charged said Home Owner stockholders for use of said Water Company's water in their homes and Home properties—during said eleven year period.

XIV.

In November, 1946, said defendant Ojai Valley Company sold and transferred said Ojai Golf Club property to the purchasers thereof, namely, Ojai Hotel Company, a California corporation, and then transferred, out of its then total of about 1500 shares in said Water Company, a total of ninety-nine shares to said purchaser,

which ninety-nine shares is the total number of said Water Company's total outstanding 2003 shares now owned by said Ojai Hotel Company,

Plaintiff will offer in evidence a list of the present Water Company stockholders, and their respective shareholdings—from which it will appear that the present record stockholders are— [14]

- (1) Ojai Valley Company, 1400 shares;
- (2) William Alfred Lucking, 151 shares;
- (3) Ojai Hotel Company, 99 shares;

(4) Miscellaneous 352 shares of individual Home Owner Stockholders holding the balance of said 2003 shares outstanding.

XV.

Since said purchase in November, 1946, of said 200 acres, more or less, of Golf Club Property—said Purchaser, Ojai Hotel Company, has used to December 31, 1952, a total of 24,108,000 cubic feet of said Mutual Water Company's water at a Total Cost of \$30,534.00 at an average charge of \$0.127 per one hundred cubic feet, whereas said Home Owners stockholders have used a total of 31,339,000 cubic feet at a total cost of \$58,204.00 or an average of \$0.187 per one hundred cubic feet.

XVI.

Therefore, said Ojai Valley Company's said use of said total of 33,323,000 cubic feet on its said Golf Club Property from 1935 up to its sale thereof in 1946, to said Ojai Hotel Company, and

of said 24,108,000 cubic feet thereafter, by said purchaser, Ojai Hotel Company, at an average

under-charge of eight to ten cents per one hundred cubic feet—or a total of upwards of \$45,000.00 less than a Total based upon the rates charged all other stockholder-users of said Water Company's water, operates as a fraudulent over-reaching of said Water Company and its stockholders, and said Ojai Valley Company should account for said Total of \$45,000.00 to said Water Company and its stockholders.

XVII.

That said amendment of March 4, 1935, was and is void and the Amendment of the Bylaws in accordance therewith is void as [15] being unreasonable and inequitable and a fraudulent device to retain control of the Water Company by said Ojai Valley Company, after it had sold all its lands susceptible to water—and is now, in substance a mere fraudulent attempt to hold control, by retaining a majority of shares of said Mutual Water Company, although said Ojai Valley Company owns not to exceed 100 acres of unsold land susceptible to use of said water whatsoever.

XVIII.

Upon plaintiffs' information and belief, (a) that since this Plaintiff filed its pending complaint in this Court against these two defendants, in File No. 13197-T, said Ojai Hotel Company has procured from said The Ojai Valley Company, by the terms of a secret transaction unknown to plaintiff, an option to purchase or acquire an additional 500

shares of said balance of 1400 shares of said Water Company—with the purpose and intent of assisting Ojai Valley Company and its present officers to maintain its stock control over said Water Company—and in the future furnish large quantities of said Water Company's water to said Ojai Hotel Company at inequitable and inadequate prices and rates, much less than the rates charged all other stockholders of said Water Company, and

(b) During said period said Ojai Hotel Company placed said Rawson Harmon on its Board of Directors (he being at all times mentioned herein a member of the Board of Directors of said defendant, Ojai Mutual Water Company) for the purpose, (and so intending) that said Rawson Harmon be able to and actually carry out the aforesaid purposes and objects set forth in subparagraph (a) *supra*—

XIX.

In the year 1950, said Water Company's water levels in its two wells were dangerously low—being at a static average in the summer and fall months of 1950 and 1951, down to a level [16] of 175 to 240 feet below pump levels, and unsafe for said stockholder Home Owners.

That in the years of 1949 and 1950 defendant Water Company, while under the control of defendant Ojai Valley Company, permitted said Ojai Hotel Company to use over 8,000,000 cubic feet on said Hotel Company's Golf Course—and while water

levels in Ojai Valley generally were dangerously low.

That in 1951 said Ojai Valley Company became alarmed over the acute water shortage existing and caused said Water Company to sink a new well at a cost of \$12,000.00—which sum said Water Company borrowed and now owes.

XX.

That the requirement of the Water Company's Articles of Incorporation and Bylaws that said Company "shall deliver said water fairly, impartially and equitably among and to its qualified stockholders," is and has been flagrantly violated by Ojai Valley Company in the years of 1936 to 1953, by its said control of said Water Company, and by it requiring said Water Company to deliver to said Ojai Country Club property about 60,000,000 cubic feet of water at a Total Rate or Revenue cost of more than \$45,000.00 less than it was delivering a similar amount of water to the Home Owner stockholders of said Water Company, and for which said total savings to said Ojai Valley Company, of over \$45,000.00, the said Ojai Valley Company should account to the other Home Owner Stockholders of said Water Company, and to this Plaintiff as their class action representative.

XXI.

It is therefore necessary to show the foregoing facts, circumstances, actions and doings of said Ojai Mutual Water Company and said Ojai Hotel Company in this Complaint, and to this Honorable

Court, in order that this Court may order or [17] decree, if necessary, that the purchaser of said Country Club property, namely, Ojai Hotel Company, which has received in the years of 1947 to 1952, inclusive, over 24,000,000 cubic feet of water at a savings of at least \$20,000.00 under the total price of water paid by the said Home Owner Stockholders—for an equal amount of water in those years,

be made a party herein and ordered to pay over to the said Ojai Mutual Water Company said \$20,000.00, and

the same to belong to the stockholders of said Water Company as constituted after final judgment of this Court in this cause, if the said bringing into this cause of said Ojai Hotel Company is necessary for the full and complete protection of all the rights and interests of said Water Company and its stockholders and of this plaintiff.

XXII.

That on April 27, 1951, the Directors of said Water Company, namely, C. J. Wilcox, Rawson B. Harmon and Fred C. Embshoff, held a meeting of said Water Company's Board of Directors and after said Water Company had delivered to said Ojai Hotel Company in the years of 1947, 1948, 1949 and 1950, over 15,000,000 cubic feet of water for its golf links,

that said Board of Directors authorized if it was necessary, the construction of a new well to cost not more than \$15,000.00.

XXIII.

In March, 1951, said Board of Directors held a special meeting and passed the following resolution, namely:

“The purpose of the meeting was to discuss the revamping of water rates, because of the fact that the Company’s operation during the previous year was at a loss, due to shortage of water and to the higher cost of operation.

“The following rates were approved, to be effective with the April 15, 1951, billing of water bills. It is estimated that these rates will take care of ordinary expenses including depreciation. [18]

Rates:

“First 1000 cu. ft. at .25c per 100 cu. ft.

“Next 4000 cu. ft. at .20c per 100 cu. ft.

“Over 5000 cu. ft. at .17c per 100 cu. ft.

“No changes are made in the current minimum charges for the various sizes of meters.

“There being no further business before said meeting, the same adjourned.

“Approved

“Rawson B. Harmon,

“Vice President.

“Attest:

“Fred C. Embshoff,

“Secretary.”

XXIV.

This was done, notwithstanding said Water Company, with a 1943 capital deficit of \$6,146.32 had a surplus thereafter, as follows:

- (1) On December 31, 1944—\$490.90
- (2) On December 31, 1945—\$4912.25
- (3) On December 31, 1946—\$7476.33
- (4) On December 31, 1947—\$11,166.32
- (5) On December 31, 1948—\$17,752.00

XXV.

Plaintiff shows further that the Books of said Water Company show that:

(a) On December 31, 1941, there was neither a surplus nor a deficit—but

(b) On December 31, 1942—there was a deficit of \$26,240.89—and

(c) On December 31, 1943—a deficit of \$6146.00

(d) But on December 31, 1944, as above stated there was a surplus of \$490.90

While there is shown on the books:

(e) On December 31, 1934, a surplus of \$18,225.00

(f) On December 31, 1935, a surplus of [19]
\$17,425.00

(g) On December 31, 1936, a surplus of \$14,-
425.00

(h) On December 31, 1937, a surplus of \$7,-
925.00

(i) On December 31, 1938, a surplus of \$4,-125.00

(j) On December 31, 1939, a surplus of \$2,-000.00

(k) On December 31, 1940—no surplus or deficit.

Plaintiff asks this Court to require an explanation of this kind of bookkeeping which shows a surplus on December 31, 1934, of \$18,225.00 and a decline to the December 31, 1942, deficit of \$26,240.89, and a “so-called” recovery in two years to a surplus of \$4,912.25 on December 31, 1945, and now as of December 31, 1952, a considerable and substantial surplus.

XXVI.

On the death of Florence Scott Libbey, about the year 1934, she left—

(a) 4656 Preferred shares of defendant, Ojai Valley Company, par value \$100 each and which were appraised in the Lucas County, Ohio, Probate Court in her Estate at \$46,500.00, and

(b) 1500 shares of Common stock of Ojai Valley Company, appraised at “nothing,” and

(c) 457 shares of common stock of Ojai Mutual Water Company, defendant herein, par value \$50.00 and appraised at \$38.50 a share—\$17,594.50.

XXVII.

On March 7, 1938, a transfer by Florence S. Libbey, to the Ojai Valley Company of 326 shares of

Ojai Water Company was approved by directors of the Water Company.

XXVIII.

On December 31, 1951, the annual report of the defendant, Ojai Valley Company showed that its entire outstanding preferred shares were carried on its books as worthless. [20]

XXIX.

On March 2, 1936, one year after said Articles of Incorporation were purportedly amended to permit "not less than one Water Company share per acre"—a Resolution of the Water Company's Board of Directors required and asked—

"Manager to survey lands lying within the exterior boundaries of the territory which may be served by the corporation and not now served, and to ascertain and report to this Board, the land and the owners thereof who might be eligible for service by the Company."

XXX.

The Record of the Minutes of the Directors' meetings of the Water Company, show the following:

(a) The records show that on April 21, 1921, 800 shares of 1996 shares were cancelled, leaving Mr. Libbey 1196 shares issued and the total capital stock was thus corrected to \$65,000.00, all on page 27 of the records.

(b) On page 31, the capital stock outstanding

is stated as \$68,950.00 as per the statement of December 31, 1921.

(c) At the annual stockholders meeting of March 7, 1927, it is recited that the shares are owned as follows: Ojai Valley Company—900 shares; Florence Libbey—457 shares—total capital stock \$72,400.00—on December 31, 1926.

(d) At the annual meeting of March 5, 1928, it is recited that the Ojai Valley Company owns 1430 shares, Florence Libbey 425 shares and that the capital stock is a total of \$100,150.00 as of December 31, 1927.

There appears no authority by resolution of its Board of Directors for these changes in the stock totals.

XXXI.

In March, 1951—said Ojai Mutual Water Company's Board of Directors ordered that said Water Rate of ten cents per 100 cubic feet was inadequate and should be increased to seventeen cents per 100 cubic feet. [21]

XXXII.

As a Summary of the preceding Allegations for the convenience of this Honorable Court—Plaintiff respectfully submits the following statements:

(a) In the years of 1936 to 1946, inclusive, defendant, The Ojai Valley Company, owned and operated the property known as the Ojai Valley Country Club of about 200 acres.

occupied and used as an eighteen hole golf course and a suitable clubhouse, at which over-night guests could be accommodated.

(b) In November, 1946, said defendant, Ojai Valley Company, sold said Country Club property for a sum of upwards of \$100,000.00 to the Ojai Hotel Company, which has actually operated and carried on said property as golf club and hotel, since said purchase.

(c) During said period of 1936 to 1946, inclusive, while said defendant The Ojai Valley Company owned and was in control of said Country Club property, and also controlled defendant, Ojai Mutual Water Company and always without the knowledge of this plaintiff—

said defendant, Ojai Valley Company, ordered and compelled said Ojai Mutual Water Company to deliver upwards of 33,000,000 cubic feet of its water to said Country Club property at a rate of ten cents per 100 cubic feet,

although the rates charged all other Ojai Mutual Water Company users and stockholders were nearly double said ten cents per 100 cubic feet rate so charged for said Country Club property to said defendant, Ojai Valley Company.

(d) By this arrangement and schedule of rates so put in force and kept in force by said defendant, The Ojai Valley Company in said years of 1936 to 1946, inclusive, it was enabled—

(1) to under-charge itself almost ten cents per 100 [22] cubic feet, on said 33,000,000 cubic feet of water, so furnished its said Country Club Property—until it sold said property in November, 1946, to said Ojai Hotel Company, and

(2) to so under-charge said Hotel Company nearly ten cents per 100 cubic feet on the upwards of 15,000,000 cubic feet of water it, said The Ojai Valley Company, so sold said Ojai Hotel Company in the years of 1947, 1948, 1949 and 1950, while it was in control of said defendant Water Company.

(e) Thus, on a total of water in said fifteen year period of 1936 to 1950—so furnished said Country Club property, as aforesaid, under said control so exercised by said defendant, The Ojai Valley Company—

a total of about 50,000,000 cubic feet of said Ojai Mutual Water Company's water was so furnished said Club property for a total of approximately \$64,000.00, and thus resulted in said unjust, inequitable and unreasonable discrimination in said water rates—of at least eight to ten cents per 100 cubic feet under-charge for said totals of water so sold and furnished to said Golf Club—and for which said under-charges of at least \$45,000.00, said Ojai Valley Company should account to said defendant Ojai Mutual Water Company and to its stockholders, now represented in this cause by this plaintiff.

(f) During the four years of 1947 to 1950, inclusive, while said Golf Club property was owned

and operated by said purchaser, Ojai Hotel Company, it was likewise favored in water rates—by the said stock control of said Water Company by said Ojai Valley Company—and in those four years a total of 17,490,000 cubic feet of water was thus delivered to and used by said Ojai Hotel Company—at a rate of approximately ten cents per 100 cubic feet—making a total charge therefor of \$19,081.00—

whereas a total of 22,200,000 cubic feet was delivered by said Water Company to its other home owner shareholders and to [23] two or three schools—for a total of \$37,568.00—as plaintiff is informed and believes, after which in March, 1951, all rates for all users of said Water Company's water were raised to a minimum of seventeen cents per 100 cubic feet.

XXXIII.

And this plaintiff avers and charges and respectfully submits to this Honorable Court, as follows:

(a) Throughout said period of 1936 to 1950, inclusive, the water charges and rates for said huge Total of 50,000,000 cubic feet of Ojai Mutual Water Company's water, so furnished said Country Club Property—

while under the control of said The Ojai Valley Company—

should have been at least twenty-five cents per 100 cubic feet (under the principles laid down by the Supreme Court of California, in the case of *Williard v. Irrigation District*, 201 Cal. 726),

and that therefore, said defendant, The Ojai Valley Company should account to and pay to said Ojai Mutual Water Company and its stockholders represented by this plaintiff at least the sum of \$75,000.00 with lawful interest thereon until paid, the same being fifteen cents per 100 cubic feet greater than the ten cents per 100 cubic feet actually charged and collected for said water so furnished and delivered in said fifteen years to said Golf Club property by said Water Company, while under the control of said Ojai Valley Company.

(b) That likewise defendant, Ojai Hotel Company, should account to said Ojai Mutual Water Company for the 24,000,000 cubic feet of Ojai Mutual Water Company water received by it from November, 1946, when it purchased said Country Club property from defendant Ojai Valley Company, until January 1, 1953, at a rate and charge of at least twenty-five cents per one hundred [24] cubic feet, or a total of \$60,000.00 upon which it has, however, only paid a total of \$30,537.00 to date—

unless said defendant, Ojai Valley Company so accounts therefor, and plaintiff asks that said

(c) Ojai Hotel Company, a California Corporation, be made a party defendant herein if it is (1) necessary for said Water Company and its stockholders to receive and be paid said balance of \$29,500.00, or (2) if it is necessary that adequate protection be afforded the Home Owner stockholders in the future for the possible injury resulting to them

in dry years, due as in 1950 or 1951 to excessive use of water on the said Golf Club property, if that be the fact.

Wherefore, plaintiff prays judgment:

1. That the defendant Ojai Mutual Water Company be forever enjoined and restrained from practicing any price discrimination whatsoever in favor of the Ojai Hotel Company or any other person, firm or corporation, in its water rates charged for water supply furnished by defendant Ojai Mutual Water Company.

2. That the defendant The Ojai Valley Company be enjoined and restrained, during the pendency of the above-entitled action and until its final determination, or until the Court shall otherwise order, from selling or in any manner transferring or becoming obligated to transfer any share or shares of stock in Ojai Mutual Water Company to Ojai Hotel Company or to any person, firm or corporation acting for or in behalf of said Ojai Hotel Company, and to make said injunction permanent upon final determination of this action.

3. That defendant, The Ojai Valley Company, be ordered to pay to defendant Ojai Mutual Water Company, the sum of \$45,000.00, and such other or further sums that the Court may find due from the defendant, The Ojai Valley Company, to defendant Ojai Mutual Water Company; and for this purpose that a special referee be [25] appointed to inspect the books and records of the defendant, The Ojai

Valley Company and the defendant Ojai Mutual Water Company, and obtain an accounting herein.

4. And for such other and further relief, including costs herein expended, as the Court may deem just and proper and for the full protection of plaintiff and the other shareholders of Ojai Mutual Water Company.

Dated: August 12th, 1953.

/s/ WILLIAM ALFRED LUCKING

State of Michigan,
County of Wayne—ss.

William Alfred Lucking, being sworn says: That he is plaintiff in the above-entitled action; that he has read the foregoing Complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

/s/ WILLIAM ALFRED LUCKING

Subscribed and sworn to before me this 12th day of August, 1953.

[Seal] /s/ MARIE TRITLE,

Notary Public in and for Said Wayne County and State of Michigan.

My commission expires July 26, 1957. [26]

[Exhibits A to G, inclusive, attached to the foregoing Complaint are not reproduced in this printed record as they are identical to Exhibits A to G attached to the Complaint in Cause No. 14945. Pages 26 to 54.]

[Endorsed]: Filed August 19, 1953.

[Title of District Court and Cause.]

ANSWER

Come now the defendants, Ojai Mutual Water Company, a corporation, and The Ojai Valley Company, a corporation, and each for itself and not for the other defendant, and answer the complaint of the plaintiff and admit, deny and allege as follows:

I.

In answer to Paragraph I thereof deny all and singular, generally and specifically, each and every allegation in said paragraph contained.

II.

In answer to Paragraph III thereof these answering defendants deny that defendant, The Ojai Valley Company was originally the owner of approximately five hundred acres of land referred to in said Paragraph III and further deny that The Ojai Valley Company is now wholly owned by the trustees of the [52] Edward D. Libbey Estate and further deny that the same was wholly owned by

said Edward D. Libbey and/or his immediate family from the time of incorporation until Mr. Libbey's death.

These answering defendants deny all and singular, generally and specifically, each and every allegation contained in subdivisions (c) and (d) of said Paragraph III contained.

III.

In answer to Paragraph IV thereof these answering defendants deny all and singular, generally and specifically, each and every allegation in said Paragraph IV contained.

IV.

In answer to Paragraph V thereof these answering defendants deny all and singular, generally and specifically, each and every allegation therein contained, except that plaintiff did purchase certain real property from the defendant, The Ojai Valley Company, and that said deed was recorded as alleged in said paragraph and that said certificate referred to in said paragraph was issued to plaintiff.

V.

In answer to Paragraph VI thereof, these answering defendants deny all and singular, generally and specifically, each and every allegation in said paragraph contained.

VI.

In answer to Paragraph VII thereof these answering defendants admit the purchase of said land

by plaintiff and that said deed was recorded on or about the date alleged and set forth in said paragraph.

VII.

In answer to Paragraph VIII thereof these answering defendants deny all and singular, generally and specifically, each and every allegation in said Paragraph VIII contained, except that defendants admit the allegations contained in [53] lines 17 to 28, inclusive, of said paragraph.

VIII.

In answer to Paragraphs IX and X thereof these answering defendants admit the allegations in said paragraphs contained, subject however to any corrections that said defendants may desire to make concerning the accuracy of the allegations respecting the records of defendant, Ojai Mutual Water Company.

IX.

In answer to Paragraph XI thereof these answering defendants admit the allegations contained on lines 9 to 14 of page 10, inclusive; and on lines 21 to 32, page 10, and lines 1 to 3, page 11, inclusive; these answering defendants deny all and singular, generally and specifically, each and all the remaining allegations of said Paragraph XI contained on pages 10, 11 and 12 of said complaint.

X.

These answering defendants deny all and singular, generally and specifically, each and every al-

legation contained in Paragraphs XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX and XXI of said complaint.

XI.

In answer to Paragraph XXII these answering defendants deny all and singular, generally and specifically, each and every allegation therein contained, except that there was a meeting of the Board of Directors held and the said Board was authorized, if necessary, to construct a new well to cost not more than \$15,000.00.

XII.

In answer to Paragraphs XXIV, XXV, XXVIII, XXIX, XXX, XXXII and XXXIII these answering defendants deny all and singular, generally and specifically, each and every allegation therein contained. [54]

XIII.

In answer to Paragraph XXVI thereof these answering defendants deny all and singular, generally and specifically, each and every allegation therein contained, except that the shares of stock of Florence Scott Libbey were appraised at \$46,500.00, in her estate.

For a Further, Separate and Second Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

That plaintiff's alleged cause of action is barred by the provisions of subdivision (1) of Section 337

of the Code of Civil Procedure of the State of California.

For a Further, Separate and Third Defense and Answer to Plaintiff's Complaint These Answering defendants Allege as Follows:

I.

That plaintiff's alleged cause of action is barred by the provisions of subdivision (1) of Section 339 of the Code of Civil Procedure of the State of California.

For a Further, Separate and Fourth Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

That plaintiff's alleged cause of action is barred by the provisions of subdivision (1) of Section 340 of the Code of Civil Procedure of the State of California.

For a Further, Separate and Fifth Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

That plaintiff's alleged cause of action is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

For a Further, Separate and Sixth Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows: [55]

I.

That ever since on or about the month of February, 1928, the plaintiff has been the owner of certain shares of stock of defendant, Ojai Mutual Water Company, a corporation; that said plaintiff had transferred to him and took title to 32 shares of stock of said defendant, Ojai Mutual Water Company on or about February 23, 1928; that said plaintiff purchased said shares from one, Mrs. Florence Scott Libbey, individually, and not from either of said defendants; that on or about the 26th day of September, 1930, the said plaintiff acquired title to, and purchased 99 shares of the stock of Ojai Mutual Water Company, a corporation, from said Florence Scott Libbey, individually, and not from either of said defendants; that on or about the 12th day of June, 1945, the said plaintiff acquired title to 20 shares of the stock of Ojai Mutual Water Company, a corporation, by purchasing and acquiring the same from the defendant, The Ojai Valley Company, a corporation.

II.

That the purchase of said 32 shares of stock of Ojai Mutual Water Company above referred to and the purchase of said 99 shares of stock of Ojai Mutual Water Company above referred to, were transferred, sold and issued to said plaintiff by

reason of the fact that plaintiff had purchased from said Florence Scott Libbey individually, 15.988 acres of land and 33.32 acres of land, all of which said land was at the time of the purchase of the same by said plaintiff, included within the exterior boundaries of the lands described in the Articles of Incorporation of Ojai Mutual Water Company, a corporation. That the total acreage of said lands so purchased by the said plaintiff in connection with the said stock in Ojai Mutual Water Company, acquired by plaintiff as hereinabove set forth, contained approximately 49.208 acres of land, more or less, [56] and plaintiff acquired, by reason of the purchase of said lands as hereinabove alleged, a total of only 131 shares of the capital stock of the defendant, Ojai Mutual Water Company, a corporation, and the said plaintiff has at all times since acquiring said shares of stock in Ojai Mutual Water Company, a corporation, received water service from defendant, Ojai Mutual Water Company, a corporation, to said lands so purchased by plaintiff as hereinabove alleged, under and by virtue of the bylaws, rules and regulations relating to the furnishing and supplying of water by Ojai Mutual Water Company, a corporation, to plaintiff and other owners of shares of stock in said mutual water company.

III.

That plaintiff further purchased and acquired 20 shares of stock of Ojai Mutual Water Company, a corporation, on or about the 12th day of June, 1945, from defendant, The Ojai Valley Company, a cor-

poration; that said shares of stock referred to in this paragraph, so acquired by plaintiff, were sold and issued to plaintiff by the defendant, The Ojai Valley Company by reason of the purchase by plaintiff of 20.92 acres of land lying within the exterior boundaries of the lands described and set forth in the Articles of Incorporation of defendant, Ojai Mutual Water Company, a corporation, and to which the owner thereof would be entitled to receive water service from said defendant, Ojai Mutual Water Company, a corporation, in accordance with its Articles of Incorporation, bylaws, rules and regulations pertaining to the furnishing by it of water to qualified land owners owning lands within the exterior boundaries of the lands described in the Articles of Incorporation of Ojai Mutual Water Company.

That the issuance of said 20 shares of stock to said plaintiff was transferred to, paid for, and accepted by plaintiff, from defendant The Ojai Valley Company, on a basis [57] of one share of stock per acre of land so purchased and acquired by plaintiff within the exterior boundaries of the land described in the Articles of Incorporation of defendant, Ojai Mutual Water Company, and to which plaintiff would be entitled to receive water from it in pursuance of its Articles of Incorporation, bylaws and rules and regulations respecting the furnishing of water and the said plaintiff accepted said shares of stock on a basis of one share per acre as herein alleged with full knowledge of

the fact that the articles of incorporation of defendant, Ojai Mutual Water Company, had been amended on the 4th day of March, 1935, providing that any stockholder desiring to use water from the Ojai Mutual Water Company shall be the owner of at least one share of the capital stock of said Ojai Mutual Water Company for each acre of land or fraction thereof to which said water was to be delivered or used thereon furnished within the exterior limits of the real property described and set forth in the original articles of incorporation of the defendant, Ojai Mutual Water Company, a corporation.

IV.

That at the time of the amendment to the articles of incorporation of defendant, Ojai Mutual Water Company, the plaintiff was the owner of approximately 49 acres of land, more or less and of 131 shares of the capital stock of defendant, Ojai Mutual Water Company and at the time, and for several years prior to said amendment of said articles of incorporation, had been receiving water service from defendant, Ojai Mutual Water Company in accordance with its articles of incorporation, by-laws and rules and regulations pertaining to the delivery of water to holders of its stock and subsequent to said amendment of said articles of incorporation the said plaintiff has continued to receive water from defendant, Ojai Mutual Water Company, a corporation, for said 49 acres of land, more or less, up until [58] the present time.

V.

That the plaintiff, ever since on or about the 12th day of June, 1945, by reason of the purchase of said 20.82 acres of land as hereinabove alleged, has been receiving and accepting water service from said defendant, Ojai Mutual Water Company, a corporation, in accordance with said amendment to its said articles of incorporation, and without protest, hindrance or objection on the part of plaintiff and in accordance with the rates and charges fixed for said water service by the Board of Directors of said water company and in accordance with its bylaws and rules and regulations pertaining to the sale and furnishing of water to its stockholders and at the prices, charges and rates fixed by said Board of Directors in accordance with its said articles of incorporation, bylaws, rules and regulations pertaining to the sale and furnishing of said water.

VI.

That plaintiff at all times herein mentioned, has acquiesced in, consented to and accepted water service from defendant, Ojai Mutual Water Company, a corporation, in accordance with its original and amended articles of incorporation and in accordance with its bylaws, rules and regulations respecting the furnishing of water by it to its shareholders; that plaintiff herein has at all times known and been aware of the fact that there is contained within the exterior boundaries of the real property described in the original articles of incorporation of defendant, Ojai Mutual Water Company, approx-

imately 2675 acres of land, all of which said land is qualified and entitled to receive water service from Ojai Mutual Water Company, a corporation, under its original and amended articles of incorporation and the bylaws, rules and regulations adopted by defendant, Ojai Mutual Water Company relative to the furnishing of water [59] service to qualified owners of land within said area and at the rates and charges fixed by the Board of Directors of said water company in accordance with its articles of incorporation, bylaws, rules and regulations.

VII.

That plaintiff has at all times herein mentioned known and been aware of the fact that there has been a heavy increase in population of the said area subject to water service above referred to and that from time to time various and divers persons, firms and corporations have purchased land within said area subject to water service and that from time to time said persons, firms and corporations have acquired shares of stock in Ojai Mutual Water Company by virtue of their purchase of land within said area owned or held by defendants, or either of them; that plaintiff, at all times herein mentioned, has known and been aware of the fact that shares of stock of Ojai Mutual Water Company have been sold to and acquired by individuals, firms and corporations owning land within said service area, which said lands were not acquired from defendant, The Ojai Valley Company, or its

grantees, and that said individuals, firms and corporations further acquiring said lands within said service area have been accepting and receiving water service from said defendant, Ojai Mutual Water Company pursuant to the provisions of its original and amended articles of incorporation as herein referred to and set forth and that said individuals, firms and corporations have relied upon the continued existence of said water service so being received by them and in reliance thereon have constructed valuable and extensive improvements, agricultural, commercial, industrial and otherwise, within said service area; that with full knowledge of said facts as in this paragraph alleged plaintiff has never protested, objected to or complained against the doing of any of said acts by the said defendants, or either of them, in [60] the sale of any of said stock of defendant, Ojai Mutual Water Company, or in the furnishing of said water service as herein set forth, or at the rates or at the prices and conditions established from time to time by the Board of Directors of said water company and in accordance with its articles of incorporation, bylaws, rules and regulations, from on or about the 11th day of January, 1928, to on or about the date of the filing of the complaint in this action, to wit: On or about the 19th day of August, 1953, insofar as any objections have ever been made or voiced by plaintiff respecting the rates, prices and charges adopted by the Board of Directors of said water company for the sale of the waters of said company to its stockholders in accordance with the

articles of incorporation, bylaws, rules and regulations of said water company.

VIII.

That furthermore, the said plaintiff at all times herein has known and been aware of the fact that by reason of the progressive and continued growth in population within the service area above referred to, the defendant, Ojai Mutual Water Company has been compelled to and has expended large sums of money from time to time in order to construct, maintain and repair the necessary facilities required by it under its original and amended articles of incorporation in order to furnish said water service to the qualified persons, firms and corporations within said service area, and in so doing has had, from time to time, to fix a schedule of rates and prices for the furnishing and supplying of water in accordance with the needs and necessities of the situation and pursuant to its articles of incorporation, bylaws, rules and regulations; that in so doing the said plaintiff has never at any time objected, protested, or in any way sought to prevent the continued water service within said service area and the expenditures necessary to be made by said [61] defendant, Ojai Mutual Water Company in order to maintain and keep said water service in effect, until the filing of his complaint in this action and until the filing of his complaint in action numbered 13197-T now on file in the above-entitled court; that at all times herein mentioned plaintiff has been aware of the fact, or by the exercise of

reasonable or ordinary diligence could have acquainted himself with the fact, that it was necessary for said original articles of incorporation of said defendant, Ojai Mutual Water Company to be amended as hereinabove alleged, by reason of the continued growth existing within said service area in order that additional consumers of water within said service area could be supplied by said water company with water needed by additional and qualified consumers within said area. That the said articles of incorporation of said Ojai Mutual Water Company were amended for the purpose of enabling it to extend its service and facilities within said service area in order to promote the expansion and growth of the said service area described and set forth in the original articles of incorporation of said water company, all of which has at all times been known to plaintiff and all of which plaintiff never complained of or objected to until the filing of his original complaint in this action, to wit: On or about the 19th day of August, 1953, or until the filing of his complaint in action numbered 13197-T now on file in the above-entitled court.

IX.

That by reason of the foregoing facts and matters hereinabove alleged in defendants' further, separate and sixth defense and answer to plaintiff's complaint, plaintiff has been guilty of laches in asserting any right, claim or interest of any kind or nature that he may now have or claim to have against any or either of said defendants, to pre-

vent them in any way from selling the water of defendant, Ojai Mutual Water Company, [62] pursuant to the rates and schedules which have heretofore been in effect by said water company and which are now in effect by said water company, or that defendant, Valley Company, be enjoined or restrained in any way or manner whatsoever, from selling or in any manner transferring or becoming obligated to transfer, any share or shares of stock in said Ojai Mutual Water Company, to Ojai Hotel Company, or to any other person, firm or corporation whatsoever, or to issue any injunction in said matter of any kind or nature whatsoever as against defendants, or either of them, or that the Ojai Valley Company be ordered to pay to defendant, Ojai Mutual Water Company the sum of \$45,000.00, or any other sum or sums, or at all, or that any referee be appointed to inspect the books and records of defendant, The Ojai Valley Company or defendant, Ojai Mutual Water Company, or to obtain any accounting therein.

For a Further, Separate and Seventh Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

These answering defendants repeat and reallege each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII and VIII of defendants' further, separate and sixth defense and answer to plaintiff's complaint and make them a part of this,

defendants' further, separate and seventh defense and answer to plaintiff's complaint and each and every alleged cause of action therein set forth, as if expressly set out at length herein.

II.

That by reason of the facts and matters aforesaid alleged plaintiff is estopped from claiming or asserting any right on plaintiff's part, or on the part of any shareholder or stockholder of said defendants, as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's [63] alleged cause of action, or for any relief prayed for by plaintiff in the prayer of his alleged cause of action, or otherwise.

For a Further, Separate and Eighth Defense and Answer to Plaintiff's Complaint These Answering Defendants Allege as Follows:

I.

These answering defendants repeat and reallege each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII and VIII of defendants' further, separate and sixth defense and answer to plaintiff's complaint and make them a part of this, defendants' further, separate and eighth defense and answer to plaintiff's complaint, as if expressly set out at length herein.

II.

That by reason of the facts and matters aforesaid alleged plaintiff has waived any right on his part to

claim or assert any right on his part, or on the part of any stockholder or shareholder of defendants, or either of them, as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's complaint, or for any relief prayed for by plaintiff in the prayer of his complaint, or otherwise.

For a Further, Separate and Ninth Defense and Answer to Plaintiff's Complaint, These Answering Defendants Allege as Follows:

I.

These answering defendants repeat and reallege each and every allegation contained in Paragraphs I, II, III, IV, V, VI, VII and VIII of defendants' further, separate and sixth defense and answer to plaintiff's complaint and make them a part of this, defendants' further, separate and ninth defense and answer to plaintiff's complaint as if expressly set out at length herein. [64]

II.

That by reason of the facts and matters aforesaid alleged plaintiff has acquiesced in and consented to the various acts and things done by these answering defendants as herein alleged and set forth and is now prevented from claiming or asserting any right on his part, or on the part of any shareholder or stockholder of said defendants as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's com-

plaint, or for any relief prayed for by plaintiff in the prayer of his complaint, or otherwise.

Wherefore, these answering defendants demand judgment:

1. That plaintiff take nothing by reason of his complaint;

2. That it be adjudged and decreed that plaintiff's complaint is barred by the provisions of Subdivision 1, of Section 337, Code of Civil Procedure; subdivision 1 of Section 339, Code of Civil Procedure; subdivision 1 of Section 340, Code of Civil Procedure, and Section 343, Code of Civil Procedure;

3. That it be adjudged and decreed that plaintiff has been guilty of laches and is not entitled to any relief prayed for in his complaint;

4. That it be adjudged and decreed that plaintiff is estopped from claiming or asserting any right on plaintiff's part, or on the part of any shareholder or stockholder of said defendants, or either of them, as against the said defendants, or either of them, by reason of anything alleged and set forth in plaintiff's complaint;

5. That it be adjudged and decreed that plaintiff has acquiesced and consented to all of the acts on the part of said defendants, or either of them, complained of by plaintiff, and that he has waived any right to complain of the same as against defendants, or either of them;

6. For defendants' costs of suit incurred herein and [65] for such other and further relief as may seem just and equitable to the Court.

/s/ JAMES C. HOLLINGSWORTH,
Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed February 10, 1954. [66]

[Title of District Court and Cause.]

MINUTES OF THE COURT
MARCH 10, 1954

Hon. Ernest A. Tolin, District Judge.

Proceedings:

Acting on previous order heretofore entered Oct. 19, 1953, herein, the Court Now Orders this case Consolidated for trial with Case No. 13,197-T Civil, and said two consolidated cases are set for trial July 6, 1954, 10 a.m.

It is further ordered that pretrial will be had in this case June 1, 1954, 10 a.m.

Clerk will issue pretrial order.

EDMUND L. SMITH,
Clerk. [68]

In the District Court of the United States for the
Southern District of California, Central Division

No. 15804-T

WILLIAM ALFRED LUCKING,

Plaintiff,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation, and THE OJAI VALLEY COMPANY, a Corporation,

Defendants.

JUDGMENT BARRING THE TAKING OF
EVIDENCE AND DISMISSAL OF COMPLAINT

The above-entitled cause came on regularly for trial on the 26th day of May, 1955, before the Court sitting without a jury, plaintiff William Alfred Lucking appearing in propria persona and James C. Hollingsworth, Esq., appearing for defendants, and counsel for defendants having moved the Court to bar the taking of evidence in said cause and for dismissal of the complaint upon the ground that the complaint does not state a claim upon which relief can be granted and upon the further ground that the same is not a class action as pleaded,

It is therefore ordered, adjudged and decreed that the said motions of said defendants be and the same are hereby granted and the taking of evidence in said cause is barred and the said cause is hereby dismissed.

Dated this 28th day of July, 1955. [69]

/s/ ERNEST A. TOLIN,
Judge.

State of California,
County of Ventura—ss.

James C. Hollingsworth being duly sworn, deposes and says: That he personally delivered two copies of the attached judgment barring the taking of evidence and dismissal of complaint to William A. Lucking, Jr., on the 3rd day of June, 1955, at 2:30 p.m.; that said William A. Lucking, Jr., stated in substance at said time that he would not approve said Judgment as to form; that in event he decided in the future to so approve the same that he would forward a copy of said Judgment to the Court with his signature endorsed thereon. Further deponent sayeth not.

/s/ JAMES C. HOLLINGSWORTH.

Subscribed and sworn to before me this 3rd day of June, 1955.

[Seal] /s/ DOMINICA STEWART,
Notary Public in and for Said
County and State.

My Commission Expires Feb. 9, 1958.

Receipt of copy acknowledged.

Lodged June 15, 1955.

[Endorsed]: Filed July 28, 1955.

Docketed and entered July 28, 1955. [71]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Ojai Mutual Water Company and The Ojai Valley Company, the defendant corporations, and to James C. Hollingsworth, Esq., their attorney:

Notice is hereby given that William Alfred Lucking, the plaintiff above named, for himself and for the other class plaintiffs, hereby appeals to United States Court of Appeals for the Ninth Circuit from the final Judgment Barring the Taking of Evidence and Dismissal of Complaint entered in this action on July 28, 1955.

Dated: August 23, 1955.

WILLIAM ALFRED
LUCKING,
In Pro. Per.

By /s/ WM. A. LUCKING, JR.,
Attorney-In-Fact.

[Endorsed]: Filed August 24, 1955. [72]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILLIAM ALFRED LUCKING INTENDS TO RELY ON APPEAL

Appellant Willam Alfred Lucking, for himself and for the other class plaintiffs herein, hereby

makes the following statement of points upon which he intends to rely on the appeal taken in the above-entitled matter:

1. The Court erred in granting defendants' motions, and in its Judgment Barring the Taking of Evidence and Dismissal of Complaint in the above-entitled cause on the ground that the same is not a class action as pleaded, in that the granting of said motions and rendering judgment thereon are contrary to law, contrary to the evidence, and not supported by any evidence.

2. The Court erred in granting defendants' motions, and in its Judgment Barring the Taking of Evidence and Dismissal of Complaint upon the ground that the complaint does not state a claim upon which relief can be granted, in that such judgment is contrary to law and contrary to the facts properly pleaded and adduced at [76] the trial.

3. The Court erred in granting defendants' motions, and in its Judgment Barring the Taking of Evidence and Dismissal of Complaint in the above-entitled cause on the ground that the same is not a class action as pleaded, in that if the action was not a properly pleaded class action, the Court sitting in equity failed to treat as surplusage the allegations pertaining to class actions and failed to render full and complete relief to plaintiff William Alfred Lucking in his individual right, which failure is contrary to law and contrary to the evidence adduced at the trial.

Dated at Detroit, Michigan, this 26th day of October, 1955.

/s/ WILLIAM ALFRED
LUCKING,
In Pro Per.

By /s/ WM. A. LUCKING, JR.,
Attorney in Fact.

Receipt of copy acknowledged.

[Endorsed]: Filed October 27, 1955. [77]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 81, inclusive, contain the original

Complaint;

Answer;

Judgment Barring the Taking of Evidence,
etc.;

Notice of Appeal;

Affidavit for Order Extending Time to
Docket Record;

Statement of Points Upon Which Appellant
Intends to Rely;

Designation of Contents of Record;

Defendants' Designation of Additional Por-
tions of the Record;

And a full, true and correct copy of the Minutes of the Court had on March 10, 1954; which together

with the Original copy of Reporter's Transcript of Proceedings of May 26, 1955 (also has No. 13197-BH), all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, the sum of which has been paid by appellant.

Witness my hand and the seal of said District Court, this 15th day of November, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14946. United States Court of Appeals for the Ninth Circuit. William Alfred Lucking, Appellant, vs. Ojai Mutual Water Company, a Corporation, and The Ojai Valley Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California Central Division.

Filed: November 16, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14946

WILLIAM ALFRED LUCKING,
Appellant,
vs.

OJAI MUTUAL WATER COMPANY, a Corpo-
ration, and THE OJAI VALLEY COMPANY,
a Corporation,
Appellees.

ADOPTION OF STATEMENT OF POINTS
AND DESIGNATION OF RECORD, PUR-
SUANT TO RULE 17

Appellant above named hereby adopts the State-
ment of Points Upon Which Appellant William
Alfred Lucking Intends to Rely on Appeal, com-
mencing on Page 76 of the original certified rec-
ord, and the Designation of Contents of Record on
Appeal, commencing on Page 78 of the original
certified record, heretofore filed with the Clerk of
the United States District Court for the Southern
District of California, Central Division, as com-
pliance with Rule 17 of the Rules of Practice of
United States Court of Appeals for the Ninth Cir-
cuit.

Dated: January 10, 1956.

/s/ WILLIAM ALFRED LUCKING,
In Propria Persona;

By /s/ WM. A. LUCKING, JR.,
Attorney-In-Fact.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 12, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION FOR CONSOLIDATION OF
ACTIONS FOR PRINTING, BRIEFING
AND HEARING

The above-entitled action and another action of the same title having been brought in the District Court of the United States for the Southern District of California, Central Division, and being Nos. 15804 and 13197, respectively, on the Clerk's register of actions of said District Court, and Nos. 14946 and 14945, respectively, on the Clerk's register of actions in the above-entitled Court, and said actions having been consolidated for trial in said District Court and having been tried therein on May 26, 1955, and the exhibits, testimony and other evidence adduced at the trial of said actions and the reporter's transcripts thereof being in many instances identical, and common questions of law and of fact being involved in said actions, and the nominal parties to said actions being the same, and both actions having been appealed to the above-entitled Court.

It Is Therefore Stipulated by and between appellant and appellees in the above-entitled appeals, through their respective counsel, that the above-entitled cases on appeal may be consolidated for printing, briefing and hearing so that duplication of printing may be eliminated, expenses reduced, and time of Court and counsel may be saved.

Dated: February 17, 1956.

/s/ WILLIAM ALFRED LUCKING,
In Propria Persona;

By /s/ WM. A. LUCKING, JR.,
Attorney-In-Fact.

/s/ JAMES C. HOLLINGSWORTH,
Attorney for Appellees.

So Ordered:

/s/ ALBERT LEE STEPHENS,
Acting Chief Judge, U. S. Court of Appeals for
the Ninth Circuit.

[Endorsed]: Filed March 9, 1956.

Nos. 14945-14946

United States
Court of Appeals
for the Ninth Circuit

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a Corporation, and THE OJAI VALLEY COMPANY, a Corporation,

Appellees.

Transcript of Record
In Two Volumes

Volume II
(Pages 137 to 289)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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In the United States District Court, Southern
District of California, Central Division

Nos. 13,197-T and 15,804-T

WILLIAM ALFRED LUCKING,

Plaintiff,

vs.

OJAI MUTUAL WATER COMPANY, a Corpo-
ration, and THE OJAI VALLEY COMPANY,
a Corporation,

Defendants.

Honorable Ernest M. Tolin, Judge, Presiding.

REPORTERS' TRANSCRIPT OF
PROCEEDINGS

Thursday, May 26, 1955

Appearances:

For the Plaintiff:

JOHNSTON & LUCKING, By
WILLIAM ALFRED LUCKING, JR.,
ESQ., and
WILLIAM ALFRED LUCKING, SR.,
ESQ.

For the Defendants:

JAMES C. HOLLINGSWORTH, ESQ.

Mr. Lucking, Jr.: * * *

Now, just to refresh the court's memory on the nature of these actions, the first action was brought as a stockholders' class action. The stockholders' representative, represented, being primarily and principally the home owner stockholders of the Ojai Mutual Water Company. That is not a derivative action, the first one. That is brought by the stockholders, by the plaintiff Lucking on behalf of the stockholders, himself, in the stockholders' own right.

The second action, also a stockholders' class action, is truly a derivative action, brought on behalf of the corporation, the Ojai Mutual Water Company, complaining of certain wrongs to the corporation.

Now, although I know the court has in the past become familiar with some of the facts of this first action, I would briefly like to refresh the court's memory on the contentions and so on. Then after I am through the plaintiff in the second action in pro per will add a few remarks which are peculiar to the second action and not involved in the first one.

Now, at the outset, we want to assure the court that these actions were brought strictly as stockholders' class actions. We feel that personalities or persons have nothing to do with it, but it is strictly business.

Now, the plaintiff, of course, recognizes, he [3*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

having practiced law for many years, that the court will guard the interests of all of the stockholders who are similarly situated. Principally those who are the homeowners, and that no relief will be afforded to this plaintiff or to any other class plaintiff that would be inequitable to any of the others. [4]

* * *

Mr. Hollingsworth: May it please the court, counsel, it is our contention, your Honor, that—I will be conservative—over 90 per cent of the allegations contained in the plaintiff's complaint are purely matters of law, which, on the face of the pleading itself, conclusively and, as a matter of substantive law, show that the plaintiff has no case in this court.

Before I expatiate a little on that, I want to make a few preliminary remarks. It is our contention, your Honor, and we feel confident that the proof will support it, that this is in no sense of the word a class action. For over 35 years the Water Company and the Valley Company, for that matter, if their theory be correct, they are a unity and identical, has never had one complaint relative to water service, distribution of water in any manner, shape or form.

We confidently assert before your Honor that no stockholder in the Mutual Water Company is one bit interested in this lawsuit, with the exception of Mr. Lucking, Sr., and Jr. He has repeatedly said to this court that this is a class action.

It is a strange thing, your Honor, that for 35 years, with some 125 or 130 customers getting

water from the Mutual, that a Sphinx silence would have been maintained all over the years relative to the conduct of the Water Company or the Valley Company, until Mr. Lucking decided to file this suit. [42]

I would like him to stand up and bring into this court any person, firm, association or corporation that will take an oath and look at your Honor and tell him that they are dissatisfied, that they are being treated or have been treated or expect to be treated unfairly, unjustly and inequitably.

This pathetic appeal that he makes to your Honor about his holdings and his property and his acreage and his stock, despite the fact we are serving customers in the Valley, may it please the court, whose interests, financially speaking, far exceed any interests that Mr. Lucking might have up there, and from whom we have never yet received a complaint of any kind as to the amount of water, as to its method of distribution or anything connected with the conduct, the management or operation of the Water Company.

Now, that is enough for that. I could go on, but I am going to come back to the fundamental law in this case. First of all, the Articles of Incorporation of the Water Company conclusively show a described surface area by metes and bounds description, filed with the Secretary of State of this State, showing that the area entitled to water from the Mutual is 2,765 acres in extent. We expect the proof to show that a certain number of those acres are what is known, or what are known as waste-

lands, and not capable of residential development or commercial exploitation, and that consequently it is not reasonably practicable that that particular acreage should [43] be served with any water at any time.

But we do expect to show that still remaining in this area, in view of the rapid and progressive growth that has taken place in Ojai, as well as other parts of Southern California, that there still remains well in excess of a thousand acres of land where people can build a home, put up a residence, buy a share of stock in the Mutual Water Company, and get water like all the other customers have been getting over the years.

Now, the Articles do not restrict, they do not limit, they do not qualify in the slightest degree the sale or distribution of water to what Mr. Lucking has conjured up in his mind and has put forth in his pleadings, that it must be restricted to the so-called Libbey lands, a perfectly meaningless phrase.

But I take it to mean, and from statements that have been made before this court, that only those who are entitled to water in this specified designated area of 2,765 acres are those who obtain title through Libbey or Mrs. Libbey, or the Valley Company through Libbey.

Your Honor, if I ever made a statement to a court, that is the most unsound, unsupported statement that I have ever listened to. There is no such thing in the Articles of Incorporation of this company, restricting the delivery and use of water on what Mr. Lucking calls the so-called Libbey

lands. [44] We furnish water to the State of California. We furnish water to the Villanova School. We furnish water to the high school. We furnish water to the Cretonya Institute. We furnish water to here and there and other users, **none, your Honor**, who ever acquired title from Libbey.

The testimony will show that the very first users after the organization of the Water Company were stockholders who did not derive title from Libbey or, as Mr. Lucking says, the so-called Libbey interests. That goes right down to date.

Completely refuting and completely contradicting this basic theory in his complaint, that we are treating him unjustly, unfairly and inequitably, because we furnish water, for example, to the State of California or to Villanova School, for example. Very true, Villanova School doesn't have as many acres as Mr. Lucking, but they have all the stock they need to supply water for their needs. The same thing is true of the high school. There is no argument about that.

Now, I say that to your Honor because the complaint on its face and the exhibits attached thereto, the Articles of Incorporation and the amendments thereto, conclusively show on their face that we are under no duty, no obligation, legally or equitably, to retire our stock after the so-called Libbey lands have been disposed of. Nor are we going to stand to have them confiscated or expropriated or any other method that Mr. Lucking might be suggesting to this court, because the [45] history of the companies will show back in 1920, when the Mutual

was organized, some two years prior to the organization of the Valley Company, that Mr. Libbey, one of the angels, I might say, of the Ojai Valley, in a search for water, in order to supply the area, to develop it, to promote it, had a vision and he went and hired the best engineering talent he could hire and he drilled a well and he got a good one. [46]

He organized his water company, not only for the land he owned, but for the land, the area taking in practically the entire western end of the Valley, including the city of Ojai.

What happened? Well, over a hundred thousand dollars was expended in the early creation of the facility, the well, the pipelines, the storage facilities for this little water company. So he turned it over eventually, as time overtook him, he transferred it, all the stock in the Ojai Mutual Water Company to the Valley Company, representing in excess of a hundred thousand dollars.

The Valley Company had the stock which they had a legal right to have.

The Court: Are you going to contend here that this was not in fact a mutual company?

Mr. Hollingsworth: No, your Honor, not at all. We expect, your Honor, that the testimony here will show that nobody could get water that didn't own stock in the Mutual Water Company.

And, furthermore, that that stock was nonappurtenant. That is another point I want to come to.

The Court: What is the definition of a mutual company?

Mr. Hollingsworth: Well, I don't know, your Honor. I have given that a lot of thought. As I understand, it is just an association of stockholders who are entitled to water from a common [47] source.

The Court: Every owner of stock in a mutual company is entitled to participate in the water or whatever it is that the company has?

Mr. Hollingsworth: If he owns stock.

The Court: If he owns stock.

Mr. Hollingsworth: That is correct, your Honor.

The Court: It doesn't mean, as I understand it generally, though, that the mutual company cannot sell water or whatever commodity it has to outsiders?

Mr. Hollingsworth: They didn't. The point is Mr. Libbey had the stock, your Honor. The Mutual never sold the stock to the Valley. It was owned by Mr. Libbey in return for the investment that he had put in. He owned it. It was his property, just the same as an automobile or a bank account or anything else.

He turned it over to the Valley Company. The Valley Company couldn't use it. They couldn't get any water. They never have had a drop of water from the Mutual Company.

The only way that anybody can get water is pursuant to the Articles of Incorporation. One, you have to own stock, but the Articles expressly provide that the mere ownership of stock does not entitle you to any water.

You have to own land in the service area. If you

own land in the service area and stock in the water company, then, according to the bylaws and the Articles of Incorporation, you [48] are entitled to water service if you purchase stock in the Mutual.

Now, that is the setup and there are a thousand setups of that kind in California. That is the conventional, customary, everyday setup for a mutual water company.

Now, furthermore, Mr. Lucking's whole complaint—and I come to another basic issue of law—is based upon the proposition that this stock is appurtenant.

Under the Articles and under the bylaws it is expressly provided that it is not appurtenant. Mr. Lucking's stock is not appurtenant, as he well knows. He can sell that stock to anybody he wants to, without selling his land.

And if he should sell it to somebody that owns land in the service area, and there is water, they would be entitled to water by virtue of the ownership of land in the service area and in the Mutual.

Now, that is a basic matter of law, your Honor, that appears right on the face of the Complaint and under Section 324 of the Civil Code. The only way that you can make water stock appurtenant to land is to adopt a bylaw to that effect and have it recorded in the Office of the County Recorder. That is Section 324.

Yet they have stood here before your Honor and have told you that the amendment to the bylaws in 1935 is void ab initio. What is void about it? [49]

All they had to do was to look at Section 324—I mean—it is Section 327, I think. I have the old '35

code here. I went to great trouble to get it. I gave your Honor at one time in this case a photostatic copy of those sections and furnished counsel with them. I now have the code with me in my file. That Code expressly provides that an amendment to the Articles may be made at a regular meeting of the corporation by, at least, two-thirds of the stock present.

We allege and set forth in our Complaint in 1935 that development in the area had progressed to the point where it was quite apparent to us that if we had to issue a share of stock for each quarter acre of land, as some of it was originally issued to Mr. Lucking, we wouldn't have enough stock to take care of the service area; not the Libbey lands, your Honor.

We had plenty of stock for Libbey lands, so-called. We didn't have to amend the Articles for that purpose. But we alleged and we intend to show those Articles were amended to take care of a progressive growth and development in that area, so we would have enough stock to go around on the basis of one share per acre, instead of four shares per acre, which is precisely what we did and what we continued to do, and which Mr. Lucking accepted on his last transaction, some fifteen years before this case was filed, or longer—somewhere in there; the statute of limitations had run on him [50] two or three times, if there was anything to his contention to start with.

He took 20 acres plus, I think, or minus, and got 20 shares of stock, which he apparently was content with, which he accepted water service on over a

period of years. Now he comes in and says that the amendment was void *ab initio*.

'There is no allegation in the Complaint in what respect it was void. He said he didn't get any notice. Under the section of the Code referred to he didn't have to have any notice.

There was a section of the Code, and the history of that section showed at one time the newspapers had a bill in the Legislature, and the Legislature passed it, that you couldn't amend the Articles of Incorporation without publishing it in a newspaper for a specified period of time prior to the meeting. But that was amended and taken completely out of the Code, and when this amendment was adopted, it was adopted exactly according to that section, and there is nothing in their Complaint, your Honor, to show how, in what manner, or in what method or by what procedure we failed, refused or neglected to follow existing statutory law at that time.

I have checked the Corporation Code right down to date, and there is still no provision in that Code requiring notice to any stockholder of an intent to amend the Articles, if the meeting is held at a regular stated meeting of the corporation, which the amendment attached to his Complaint shows on its face was done. [51]

Now, that is a matter of law, your Honor. It is a matter of substantive law.

He complains of the amendment because he says it gives us control. It doesn't give us control at all. If we sell that stock to qualified users within the

service area, we are not particularly concerned with control here. It is not our thought at all.

We should like to get rid of this stock to bona fide users within the area. Valley Company has no intent to harm or injure Mr. Lucking. But we do contend that under the Constitution of this State, and even under the Federal Constitution we cannot be deprived of our property, a valuable piece of property, and the assets of the Mutual have steadily risen in value over the years. We have a very splendid well, a fine producer, and all of which cost the stockholders nothing.

Maybe this was a great mistake that the Valley made, your Honor. Maybe we shouldn't have done it. Maybe we did an act that Mr. Lucking could complain of, but when we had to drill a well up there and we needed \$15,000.00, we didn't assess Mr. Lucking or any other stockholder. The Valley Company let the Water Company have the money to drill it. It is a wonderful well; practically a million gallons a day. We are using approximately 2 per cent of the available supply in that area.

Mr. Lucking is very fearful some of these farmers—he [52] mentioned these farmers, yes. I know something about those farmers. They open up their head gates and run the water 24 hours a day for two or three weeks. They use more water in one week than the Mutual Company would use in three months.

Yes, they are very much up in arms because they think that their little mutual or some other instru-

mentality up there purchasing water should be choked off.

In other words, these people over the years, some 35 years, their homes and residences, many homes much more expensive than Mr. Lucking's, who have been getting good service, and well satisfied with the situation, have never complained orally or in writing at any time.

Now, getting back to the proposition that he contends for, that because the Valley Company owns a majority of stock in the Water Company, that that on its face seems to be some foul situation, smacking of unfairness, injustice and inequity.

I only have to refer him to some of the corporations over the country, like the Bell Telephone Company, United States Steel Company, and I could refer to a thousand of them, all of whom have totally-owned subsidiaries. But there is nothing legally wrong about it.

The Valley Company had as much right to take that stock from Mr. Libbey as somebody has to go down here and buy a share of stock in the United States Steel. Unless he can [53] show your Honor that we have done something unjust, unfair, inequitable, detrimental to him, detrimental to the Water Company, we are prepared to show your Honor that we have watched that company with meticulous care over the years. We have never yet had an assessment.

Now, he complains about water, about rates for water, over here at the golf club. Well, your Honor knows that every utility and every water company,

whether it be mutual or otherwise, has a sliding scale of rates.

If you consume more electricity up to a certain point, the Edison Company will give you a lower rate. If you take more gas in a certain period of time, the gas company is going to give you a rate.

If some water company can sell a man a million gallons of water and it is available for use, they will give him a better rate than a man that uses a hundred gallons a day.

Now, that is exactly what we did, and that is exactly what Mr. Lucking is complaining about in the so-called country club case.

The testimony will show that we have a sliding scale of rates, based upon the amount of use, the more water you use the lower your rate. That is common every-day practice for mutuals, public utilities and all kinds and types of companies. It is sanctioned by custom. It is sanctioned by economics and it is sanctioned by logic and reason. [54]

The Court: Do you sell water to anyone who is not a shareholder?

Mr. Hollingsworth: No, sir, we never have. We sell no water to anybody that doesn't own stock in the Mutual Water Company. [55]

He can own all the stock he wants to, and then he can't get water unless he has land in the service area. That is it, your Honor. That is right in the articles and bylaws.

You could go up there and you could buy all of the water stock from the Valley Company, and you would not be entitled to a drop of water, and it

would not help you out a bit under the Articles of Incorporation unless you owned land. That is expressly so provided, that you have to have both land and stock in the service area.

The Court: You contend that it is the service area which defines the boundary, and not the original Libbey interests?

Mr. Hollingsworth: Why, your Honor, they have no more to do with it. There is nothing in the record, your Honor, there is nothing in the history of the company, there is nothing in our operations over the years past to show that we were only furnishing water to owners of the Libbey property.

That is absolutely not the case. The Articles expressly prohibit it. There is nothing in those Articles describing the Libbey property to the exclusion of all other property. If that was the proposition, all Mr. Libbey had to do was to describe his 640 acres, and say that only shares of stock shall go on that land—period.

But, as I stated to your Honor, the testimony will show [56] that the very first users of water got stock, who were not owners of Libbey land.

We never started out to predicate an argument here for Mr. Lucking that after we went along for 25 years, we only gave stock to Libbey owners, and only gave them water. That is not true, because at the very beginning, at the inception, the first people that got stock were non-Libbey owners.

Now, as to Mr. Lucking, I don't know where he ever got the idea after he read the Articles of Incorporation, and after he read the bylaws, and after

he has been through our office, your Honor, with a fine-tooth comb, and he has had access to it and has looked it up, and he has had the privilege of doing it. We never at any time held anything back from him. It is an open book, and yet he says he is not **bound by the Articles of Incorporation** because he didn't know about this situation when he bought his stock.

I will have to refer him to the fundamental law on the subject, that when he bought stock in a corporation, he took it with notice and knowledge of the Articles and the bylaws.

And he alleges no fraud or concealment, no misrepresentations of any kind, to the effect that his lands were Libbey lands and that nobody else could get water but Libbey owners.

Now, your Honor, that is our position in this case. It is our contention that this is nothing but an attempt on the part of Mr. Lucking to take over the Water Company by this [57] method. He wants you to cancel in excess of 1000 shares of valuable stock owned by the Valley Company. He will then be the largest stockholder left, with 151 shares. There is no other stockholder that owns as many shares as Mr. Lucking. There are some that own—I will take that back, your Honor. I want to be corrected on that. For a long time he was the largest stockholder, and I still think he is the second largest stockholder.

I think the Country Club has 200 acres and 200 shares. I may be mistaken, but I do not think so.

I think that Mr. Lucking owns, and he is the second largest holder, he and his son put together.

Now, he talks about that Country Club. We turned it over to the Army and Navy during the war. They went in there with bulldozers, and they put in pipelines. They had to have water for men, they had to have water for this, and water for that, and we let them have it. That was during the period of time when we used a lot of water. Yes, they got a lot of water from us over there, but it was a situation where this country was in war, and we did let them go in and use large amounts of water.

The Court: I don't gather Mr. Lucking is complaining about that.

Mr. Hollingsworth: He is complaining about the amount of water used at the Country Club. He says that in his [58] second cause of action, and he has given your Honor figures on a percentage basis.

The Court: He gives me the impression that he is alleging that the water supply is short.

Mr. Hollingsworth: Yes, your Honor, and I am coming to that.

The water supply is not short. That we deny, and we are prepared to prove by qualified competent experts. If it were short, your Honor, that is no basis for confiscating our property. If there is a shortage of water up there, we are all going to be treated alike.

If it gets to the point where somebody can only use 500 gallons a day, why, that will be it. It has never got to that point, your Honor. We have never rationed water. It has never been done in the whole

history of the concern, that we ever rationed domestic water to anybody. Our wells have never broke suction. Our wells have continuously increased since 1951.

Certainly, all Southern California in 1951 was faced with a condition on account of a dry year, where there was a water shortage. That is nothing new in Southern California. That is true. But it is the first time I have ever heard that property can be cancelled or taken away under a method or procedure of this type.

Now, that is our position in the matter, your [59] Honor. So far as a water shortage is concerned, Mr. Lucking has never been shorted on water. He has had water all along. He may be worried about it, yes, but that is purely surmise and conjecture.

I can readily understand where somebody might be worried about how much rainfall we are going to have in 1956, 1957 or 1958. Mr. Lucking, Jr., says water comes in cycles. Referring to that, if it comes in cycles, we have gone through a long dry cycle, and the probabilities are and the chances are very good that we may be entering into a wet cycle, but whether we are or whether we aren't, the Court is faced with the fact and not with a period.

Your Honor is faced with existing conditions, as they now are, and as they have been since the filing of this complaint.

Now, I have taken up more time than I intended to.

The Court: You can take up more, if you want to.

Mr. Hollingsworth: No, your Honor.

The Court: I am trying to get a grasp of the issues here, and I am glad to hear what you have to say on them. If you have finished, why, I will content myself with re-reading the file.

Mr. Hollingsworth: I can conceive that this case could be readily tried in maybe not to exceed a day or two. The matters of law which I have referred to all appear upon the [60] face of the complaint. That is a matter of substantive law, your Honor. You don't need any testimony on that.

The Court: Well, many of them might be raised by a motion of one kind or another, or an objection to evidence.

Mr. Hollingsworth: To testimony, yes. That is what I intend to do. I intend to object to testimony on the ground that these portions of the complaint do not state a claim or cause of action. I intend to do that, but I want to point out to your Honor that you have an expeditious way of disposing of this case absolutely on cold law, because if it be the law that——

The Court: Equity comes in there, too, doesn't it?

Mr. Hollingsworth: Equity comes in.

The Court: And equity is not supposed to be cold.

Mr. Hollingsworth: That is right. Equity follows the law. That is true. Equity can't change the Articles of Incorporation, your Honor. Equity can't say that we can only furnish water to Libbey lands. Equity can't say that the amendment to the Articles is a void amendment.

The Court: And this is not a condemnation proceeding.

Mr. Hollingsworth: No, definitely not. It is a confiscation proceeding, not a condemnation. That is, your Honor, if you condemn a man's land, you at least have to pay him for it. But they want to confiscate over 1,000 shares of water stock that the Valley Company owns, just wipe it out. Of course, we can't stand for that. [61] That is a little bit richer cream than generally rises on the milk of human kindness.

We have been kind and considerate enough not to levy any assessments against Mr. Lucking for his water service, and we have that very fine well that has been developed up there for him and for the other stockholders, but we still think we are not going to let him confiscate our stock. [62]

* * *

May 31, 1955—10:10 A.M.

* * *

Mr. Hollingsworth: I might be able to save time at this particular point, may it please the Court, if I object at this time, which I do, to any testimony in this case upon the ground that it fails to state a complaint on behalf of this plaintiff as against the defendants, or either of them. In other words, that the complaint fails to state a cause of action as against the defendant, The Valley Company, the Ohio Corporation, or the Ojai Mutual Water Company, the California Corporation.

The reasons for it appear upon the face of the

complaint itself, because having adopted and pleaded as one of the exhibits in the case the Articles of Incorporation of the Ojai Mutual Water Company, it plainly and clearly appears on the face of the pleading itself that the Mutual Water Company is not restricted or confined in any way under [70] the Articles of Incorporation to furnish water only to so-called Libbey landowners, or those acquiring title from the Valley Company.

Secondly, that the amendment to the Articles of Incorporation—the pleading on its face—shows that there was a valid amendment to the articles, and, under the law, as it existed in 1935, of which the court will have to take judicial notice, there was no requirement in the Code to the effect that the plaintiff here had to have any notice of an amendment of the Articles of Incorporation increasing the requirement for water users from one share, that is, to one share per acre rather than one share per quarter acre.

Furthermore, that the complaint on its face shows that it is barred by the statute of limitations, for over seven years, apparently, have gone past from the time that Mr. Lucking took title to his property, or, over five years I would say from the time he took title to his last parcel of property, where he obtained one share per acre at that time, and continued to receive water for that property on that basis, and we feel that the complaint does not state the facts.

We made a preliminary motion before the court, it is true, to dismiss upon the ground it did not state a claim. [71]

The Court: Didn't you make two, one to Judge Westover and one to me?

Mr. Hollingsworth: No, it was never before Judge Westover, your Honor. The only, this is the only court that—we never appeared before Judge Westover.

The Court: I noticed that a motion had noticed there, and then the next thing that came along was an amended complaint.

Mr. Hollingsworth: Yes, and then we renewed—what happened, as I recollect, your Honor, was that the case was originally assigned to Judge Westover and we had filed a notice of motion with him, and before it could be heard I think your Honor assumed your duties as one of the judges of this court, and then the next thing to my recollection, according to the file, we received a notice that the entire matter had been transferred to this court and it has been here ever since.

We never made any appearance in Judge Westover's court. That is your recollection, isn't it?

Mr. Lucking, Jr.: That is correct, Mr. Hollingsworth, there was never a motion before Judge Westover.

Mr. Hollingsworth: There was never a motion.

The Court: I have, of course, lived with the case much longer now than I had at the time that the motion was before me the first time. When it was before me the first time I [72] was under that difficulty which is common to new judges of the court, where they get a plethora of cases, and you have like motions in some fifteen or twenty cases at a

time. And it just isn't physically possible to give them the attention you can after you have gotten into the groove a little and have only a normal number of cases.

I have gone through the files in both these cases in great detail and read the authorities that have been cited. I don't know now how I will rule, but I think the making of the motion at this time is appropriate, if for no other purpose it perhaps will clarify and limit our factual issues, define the areas of testimony which will be later on admitted.

Mr. Hollingsworth: I think the matter can be greatly shortened whichever way your Honor rules here. It is purely an issue of law, your Honor.

The Court: It seems that these pleadings are what we used to call speaking complaints. They don't just limit themselves to the ultimate facts, but they spell out pretty well a lot of the evidentiary matter. They tell the story in much more detail than is necessary in order to state a claim under Rule 8, if a claim can be stated in these cases.

So do you want to expand on your motion, Mr. Hollingsworth? I understand that you are making them as to both cases? [73]

Mr. Hollingsworth: Oh, yes. Yes, in both cases, your Honor, that is true. I should have prefaced my remarks to that effect, on both cases, because the second case, all they claim is that we charge one consumer more than another, without any statement of fact at all as to the amount or the extent of the use of water between one particular consumer and another class of consumers, and nothing in the

second complaint at all which alleges that the consumer, that he complains of the Ojai Country Club, so to speak, is on a different basis than other consumers in the same category, taking the same amount of water.

He just claims we undercharged them, which is a pure conclusion on his part. But there are no facts showing preference or discrimination in favor of that particular consumer, as against other consumers, because he doesn't state in his Complaint what our schedule of rates are and how much we charge a consumer that only takes so many cubic feet of water compared to another consumer who may take a substantially larger amount of water.

And that Complaint, we feel, doesn't state a claim as against either defendant here, and it is just simply a matter of law for the court to determine from an examination of the pleading itself whether or not you want to take testimony here concerning classes or categories of consumers, relative to water charges made by the Valley Company for [74] water actually serviced.

That, we feel, is purely a matter of law and the schedule is entirely contrary to the way Mr. Lucking has it set up in his Complaint, but that would not go to the question as to whether or not it states a claim. But on its face it doesn't show, as I have already said, that we have discriminated in favor of the Ojai Country Club as against other consumers in the same category, if there be any in that category.

Now, I assume the same practice here obtains that obtains in the state court, that it isn't necessary to make an objection every time a question is asked here, but that it may be understood that all the testimony on behalf of the plaintiff is going in here subject to our motion to dismiss and our objection to the taking of testimony upon the ground neither complaint here states a claim under the Rule 8, or, as we would say in the state court, states a cause of action against either one of these defendants.

I do sincerely feel, your Honor, that the issues here can be very sharply limited, in view of the actual pleadings themselves. Your Honor can at your leisure determine whether or not the amendment to the Articles was valid. It is purely a question of law. Your Honor can do the same thing respecting the powers granted to the Ojai Mutual Water Company, under its Articles of Incorporation. In other words, [75] are we restricted or confined to water service to those who Mr. Lucking claims must have acquired title to their lands through Libbey? The Articles themselves completely negative that contention on his part.

Now, whether the amendment is a valid amendment or not is purely a question of law. The amendment is pleaded. All he says to invalidate it is that he had no notice of it. That is our position in the matter, your Honor.

The Court: Do you want to argue it?

Mr. Lucking, Jr.: Yes, your Honor, I certainly do. If I seem to stutter around a bit, your Honor,

it is because this motion was unexpected, since I thought we had already had this out.

The Court: Well, we did have extensive argument on it, as I recall it, or at least we had arguments that stuck in my memory and I from time to time get out the file and do a little reading on it when your motion to dismiss was originally made, but it is proper new motion at the outset of the trial.

Mr. Lucking, Jr.: Yes, your Honor, I am aware that counsel——

The Court: So do you want to go ahead or shall I take a brief recess while you get organized for your remarks here? [76]

Mr. Lucking: Your Honor, I think we can proceed at this time, if the court please.

Now, Counsel has reiterated the statement made by him in the opening statement with regard to this requirement of notice.

He said that he has examined the Corporation Code from start to finish, and he has found even up to date no requirement of notice for the passage of this so-called 1935 amendment, as attempted.

Now, I don't honestly know how counsel could have missed it, particularly since both on oral argument three years ago and in my brief I set forth and refer to California Corporations Code Section 2201.

Now I don't happen to have here at the moment the up-to-date Corporations Code. However——

The Court: That is the one that was in force at the time?

Mr. Lucking, Jr.: That is correct, your Honor. However, a cursory glance at the present Corpora-

tions Code shows that Section 2201 of that Code was based upon the former Section 312 of the Civil Code.

Now, in view of counsel's opening statement, I brought along a copy of the Civil Code which I acquired, dated 1931, and pasted in it is what I assume to be an amendment to Section 312 of the Corporations Code, at the bottom of which it [77] states:

“(In effect 90 days from and after May 22, 1943, Section 1(a) Article IV Constitution, Statutes 1933, Chapter 533.)”

and then in the lower right is the statement, “Civil Code, 1933.”

Now, your Honor, I am not aware of any change in that, or any substantial change in that, or in the language to which we refer, from that date on until now. I did have a 1937 Code, checked that, and it is still there.

I see no record in any of the Annotations of its having been changed, and it exists today in substantially the same language as it did in 1933, when it was enacted, two years, or approximately so, prior to this attempted 1935 amendment.

I would like to quote this language to the court, and to read it into the record, quoting from Section 312 of the Civil Code of the State of California:

“An annual meeting of shareholders shall be held at 11:00 o'clock in the morning on the first Tuesday of April in each year at the principal office of the Corporation, unless a different time or place be provided in the bylaws. At such meetings directors

shall be elected, reports of affairs of the Corporation shall be considered, and any other business may be transacted, which [78] is even within the powers of the shareholders, provided that written notice of the general nature of the business or proposal shall be given as in case of a special meeting, even though notice of regular or annual meetings be otherwise dispensed with, before action may be taken at such meeting on——”

To shorten time now I will skip to subsection (4)——

“(4) A proposal to amend the articles except to extend the term of the corporate existence.”

Counsel, do you want to look at this?

Mr. Hollingsworth: I have the Section 312, 1935 Code, and your amendment was in March of 1935.

Mr. Lucking, Jr.: Is there any difference in 1935 from the law as it was when I read it?

Mr. Hollingsworth: I think so, because that required publication in newspapers, didn't it?

Mr. Lucking, Jr.: No, sir, it did not. I quoted it. You can look at it, if you want to.

Mr. Hollingsworth: I am not disputing your word. What Code do you have there—1931?

Mr. Lucking, Jr.: 1931. Does the court wish to examine this?

(The volume was handed to the court.)

Mr. Lucking, Jr.: If your Honor please, we could get [79] the Statutes, the Sections of the Code, the big volume, if there is any question about it. Counsel

says he has the 1935 Code there. Is Section 312 as I quoted it in that, counsel?

Mr. Hollingsworth: Well, it does not have the amendment you have to it there. You have a 1935 amendment to the 1931 Code.

Mr. Lucking, Jr.: I have a 1933 amendment to the 1931 Code.

Mr. Hollingsworth: Well, it is the 1935 Code that applies.

Mr. Lucking, Jr.: The legislative history of that, according to this, your Honor, states, "Added by statute 1931, page 1778."

Counsel is calling this a 1935 Code, but it says 1933 on the outside of it.

Mr. Hollingsworth: I mean 1933.

Mr. Lucking, Jr.: Well, there is a difference, Mr. Hollingsworth. There is a big difference.

Mr. Hollingsworth: All right.

Mr. Lucking, Jr.: I don't think that was brought up to date. If your Honor has any question about that, I would be very happy to get the Codes, and we could go right into the legislative history of it, but I had checked the 1937 Code, and it is there, and it is in Section 2201 of the Corporations [80] Code, to which I referred.

The Court: Well, let's have Mr. Hollingsworth's view on it now.

Mr. Hollingsworth: I have it here, your Honor, and I will read it into the record, if I may.

This is a chronological history of the situation. The 1933 Code applies. I wrote the Secretary of State to find out if there was any special session of

the Legislature following the adoption of the 1933 Code, and there was none.

The amendment to the articles in this case took place prior to the effective date of the 1935 Code, so the 1933 Code is the one that governs the situation.

Now, here it is: On the 4th of March, 1935, at a regular meeting of the board of directors of the Ojai Mutual Water Company, a resolution on the amendment—now, this was a regular meeting—a resolution on the amendment to the Articles of Incorporation was adopted. This was the regular annual meeting of the stockholders of the corporation.

1,740 shares of the 2,003 shares of stock issued and outstanding were duly represented at said [81] meeting.

The 1,740 share so represented unanimously adopted an amendment to the Articles of Incorporation respecting the per-share per-acre for the use of water as follows:

“Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof to which said water is to be delivered for use thereon situated within the exterior limits of the above-described property and that such land to which said water is to be delivered for use thereon situated within the exterior limits of the above-described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such man-

ner as the bylaws of the company may determine. Mere ownership of stock in said company or of land situated within the above-described limits shall not entitle the stockholder to any water whatsoever unless he and his land shall otherwise be eligible.”

The amendment to the Articles of Incorporation was filed in the Office of the Secretary of State on September 27, 1935, endorsed by Frank C. Jordan, by Charles J. Hagerty, Deputy. [82]

The certificate of the Secretary of State Frank C. Jordan, by Charles J. Hagerty, Deputy, was issued on the 28th day of September, 1935, and said certificate was filed in the Office of the County Clerk of the County of Ventura, on the 30th day of September, 1935.

The date of the amendment in question is governed by the provisions of Section 362(a) of the 1933 amendment to the Civil Code. The 1935 Legislature adjourned on the 16th day of June, 1935. Laws enacted by it other than emergency measures would not go into effect until September 16, 1935, under constitutional provisions. The legislative session prior to 1935 was the 1933 session. The 1933 Legislature amended Sections 362, 362(a), and 362(b) on the 24th day of March, 1933. These particular sections of the Civil Code were in effect at the time of the amendment of the Articles in the instant case.

Section 362 of the Civil Code, 1933, is the general provision specifying the respects in which the Articles of Incorporation may be amended.

Section 362(a) of the same Code sets forth in general the proceedings necessary to amend the Articles of Incorporation. If the purpose of an amendment under Section 362(a) is to change the preferences or restrictions of any class of stock or shares authorized by the corporation, such amendment must be approved by resolution of the board of directors [83] and by consent or authorization of at least two-thirds of the outstanding shares of the corporation. The resolution or consent of the shareholders approving any amendment shall establish the wording of the amendment or amended Articles by providing that the Articles shall be amended as read and therein set forth in full.

Section 362(b) of the same Code provides that upon the adoption of any amendment to the Articles, stating the manner of its adoption, shall be filed as follows: In case of an amendment adopted by the incorporators, the certificate shall state that the signers thereof constitute at least two-thirds of the incorporators. The certificate shall be signed by at least two-thirds of the incorporators and shall be verified by the oath of the signer.

In case of an amendment adopted by the shareholders or by the directors the certificate shall be signed by the president, or vice president; shall set forth a copy of the resolution of the board of directors; time and place of the meeting of the shareholders and a copy of the resolution adopted thereat and the total vote by which the amendment was approved.

I might intersperse at this time, that all of which appears to have been done. Now going on.

This is the method employed by the Mutual Water Company in adopting the amendment to the Articles on March 4, 1935. [84]

This is the significant thing of the whole thing: Section 362(b) further provides that the certificate shall be submitted to the Secretary of State, who shall file the same and put an endorsement of filing thereon if he finds that it shows a compliance with the provisions of the law. Thereupon, the Articles of Incorporation shall be deemed amended in accordance with such certificate and a copy of such certificate certified by the Secretary of State shall be prima facie evidence of the performance of the conditions necessary to the adoption of such amendment.

The Court: You, as I understand it now, Mr. Hollingsworth, are now conceding that notice was necessary, as Mr. Lucking insists, but that the certificate of the Secretary of State is evidence that notice was given.

Mr. Hollingsworth: Precisely, your Honor, because there is an affidavit on file in this case. We had a barnful of records and they were burned and destroyed.

We went to the former attorney of the Ojai Mutual Water Company—set that forth in our affidavit—and tried to check back the old records relative to the amendment, but he did not have them. His files had been destroyed, some fifteen years had elapsed and he had destroyed all of his

old files. We undoubtedly had these records in the old warehouse up there, which burned and were destroyed, but on its face, under Section 362(b) the Secretary of State, [85] when he filed those Articles, it was part of his official duty to determine if the necessary procedure had been done, had been gone through with, and when he filed them it became prima facie evidence, and Mr. Lucking furthermore, under another defense we have pleaded here, waited for over 15 years, which I think is on its face—it shows laches on his part.

The Court: But time will never make a void act valid.

Mr. Hollingsworth: Oh, no. That is very true, your Honor, but we contend that the certificate filed by the Secretary of State, approving the amendment to the Articles, is evidence before this court that all notices required by law had been given.

The Court: Well, if we can take that as evidence, can't we take evidence, other evidence you might wish to offer or evidence that Mr. Lucking might wish to offer on the same subject?

Mr. Hollingsworth: To the effect that the corporation gave no notice?

The Court: Yes.

Mr. Hollingsworth: Yes, that can be done.

The Court: Then your motion to exclude the taking of evidence still, I take it, admits to the taking of evidence on this particular subject. You are not asking me to foreclose the taking of evidence that notice was not given? [86]

Mr. Hollingsworth: No, no, definitely not. If it is competent evidence, no.

If he can show, if he can produce any person, any member or officer, or board of director, or any resolution contained in the minutes, or anything of that kind, to the effect we did not give this notice, that would be competent evidence here. But all he alleges in his Complaint is that he personally received no notice. That isn't evidence of the fact that we didn't conform. That is our contention. That is his only contention, is that he never got notice, despite the fact he bought land subsequent to that time and took one share per acre, when he already had other land that he had been given shares under the old amendment.

The Court: Well, let's proceed and take evidence on this limited subject. Then we will proceed to the next order of evidence.

Mr. Lucking, Jr.: Your Honor please—are you done, counsel?

Mr. Hollingsworth: Yes.

Mr. Lucking, Jr.: His motion was too inclusive. We are just going to go through this again. I think—let's get this thing out here.

The Court: Are you addressing yourself to something besides this matter of the notice now?

Mr. Lucking, Jr.: Excuse me a minute, please, your [87] Honor.

I would at this time like to know whether your Honor wants to consider Mr. Hollingsworth's entire motion and your Honor wants more argument on it, whether, for the purposes of his motion, Mr.

Hollingsworth is considering that all the facts well pleaded are true in the Complaint. In other words, what is our status right at this point? The motion was quite inclusive.

The Court: You want to state the motion as you wish the court to consider it now, Mr. Hollingsworth?

Mr. Hollingsworth: Yes, your Honor. Well, I made an objection to receiving any testimony here upon the ground—in both cases—upon the ground neither complaint in either case states a cause of action against the defendants or either of them, on the ground that the Articles of Incorporation speak for themselves and have been pleaded, except to the effect we have 2,765 acres of land in our service area and we are not limited in the servicing of water to the so-called Libbey lands.

Secondly, that the amendment, so-called alleged invalidity of the amendment to the Articles of Incorporation, shows on the face of the Complaint itself it was a valid amendment.

Furthermore, that the service of water to the consumer in the second case, claiming a preference or discrimination, in his favor as against other water users, does not state a [88] claim or cause against the defendant or either of them and upon that ground and for those reasons, that no testimony be received here in this case on behalf of the plaintiffs, and further renewing the first motion to dismiss here upon the ground that the Complaint does not state a claim under Rule 8 either against the Valley Company or the Ojai Mutual Water Com-

pany in either or both cases. That is as short as I could make it.

Mr. Lucking, Jr.: I would like to inquire, counsel, do you admit that all the facts well pleaded within the scope of your motion are true?

Mr. Hollingsworth: I don't think the facts were well pleaded, Mr. Lucking, because——

Mr. Lucking, Jr.: That is a matter of law, Mr. Hollingsworth. I am asking what you mean by your motion.

Mr. Hollingsworth: Only as to those allegations in the Complaint that are well pleaded, your Honor, and that is as far as I will go. I don't think there is any pleading properly before the court relative to the invalidity of this motion. The presumption is to the contrary.

The Court: Well, there is a presumption that the Articles were properly amended. Doesn't a presumption or, at least, an inference arise from the fact that a stockholder of record did not receive notice?

Mr. Hollingsworth: I don't think so, your Honor, not [89] under that provision.

The Court: Don't the two come in conflict?

Mr. Hollingsworth: I don't think so.

The Court: It is presumed that the regular course of mailing——

Mr. Hollingsworth: That is right.

The Court: ——is successful.

Mr. Hollingsworth: It is presumed that the regular course of business has been followed by the corporation and it is presumed that the corporation

acted according to law. That is a statutory presumption. The mere fact he didn't receive a letter or, any other stockholder, some notice in the form of a letter wouldn't, in my opinion, justify a court in holding that the notice required, if any, to amend the Articles, had not been given, when the Secretary of State had put his stamp of approval on the amendment and had filed it under the provisions of Section 362(b).

The Court: You are contending that the duty of the corporation was complete when it gave a notice, irrespective of whether a particular shareholder received it or not. [90]

Mr. Hollingsworth: Correct; correct. No question about that.

But another significant fact in the case which cannot be overlooked, and which appears on the face of the complaint is that he took under the four share provision per acre, and then bought land at a later date, and took under the one share per acre provision. He is estopped, according to our pleadings, to question it.

The Court: According to his pleadings?

Mr. Hollingsworth: According to our defense. We, at least, set up a defense of estoppel and laches, and according to the complaint, on its face he stands estopped, because he admits in his complaint that he took and bought 20 acres of land, and for which he got one share per acre, of which he is now complaining, and for years accepted water on that basis.

The Court: Then the court understands that you

are presently urging a motion in each case to exclude the taking of any evidence?

Mr. Hollingsworth: Correct, your Honor.

The Court: And for the court to decide this case as a matter of law?

Mr. Hollingsworth: As a matter of law. That is exactly it.

The Court: Upon the pleadings? [91]

Mr. Hollingsworth: Yes. Your Honor has correctly stated it.

Mr. Lucking, Jr.: Do I understand from that, your Honor, that counsel is admitting all facts that——

The Court: For the purpose of the motion.

Mr. Lucking, Jr.: For the purpose of the motion?

The Court: For the purpose of the motion he admits that all facts are correctly stated.

Mr. Lucking, Jr.: Very well. Does the court desire more argument on it?

The Court: I would like some more. I don't——

Mr. Lucking, Jr.: All right, your Honor. If the court would like some more, I would be very happy to help in the matter.

The Court: Now, counsel is here from San Francisco, and he has another matter pending. I take it your argument will be somewhat extended, so, Mr. Gallagher, would you like to come back in chambers for a moment?

Mr. Gallagher: I would appreciate it, your Honor.

The Court: Then we will take a recess in this case.

(A short recess.)

The Court: Mr. Lucking——

Mr. Lucking, Jr.: Yes, your Honor.

The Court: ——I have decided to deny this motion in so far as it pertains to the question of whether the articles of [92] incorporation were properly amended. As to the other parts of the motion, my mind is still open.

Mr. Lucking, Jr.: All right.

The Court: He wants to limit you to that issue. In fact, he wants to limit you to your pleadings, but as to that issue we are going to take evidence.

Mr. Lucking, Jr.: Your Honor, I have been trying to get this out, or trying to make a statement on this for some time. It has been repeatedly said, both in the opening statement and several times today, that we allege only that we received no notice.

Now, at the bottom of page 5 of the first amended complaint—I just have to get this off my chest, because it incenses me—the last paragraph on page 5, beginning at line 30 of the first amended complaint states:

“That of the stockholders meeting of said defendant Ojai Mutual Water Company at which this Amendment, Exhibit ‘B,’ was authorized, plaintiff received no notice of said intended Amendment to said Articles of Incorporation as required by law; and upon information, no such notice of said intended Amendment was given as required by law.” [93]

In other words, there is an allegation that it wasn't given. I just had to get that off my chest, your Honor.

Now, counsel says that on the face of the complaint, since we pleaded the articles of incorporation, that we are bound by the articles.

The articles, being nothing more than a part of the complaint by reference, and saying that these are the articles as they appeared, now or at that time, is obviously and clearly modified by the later and different allegations in the complaint. In other words, the articles as pleaded, merely state that, now, here is what the articles say, and here is what we say.

Now, because of that, and because of the fact that your Honor has to read the complaint in its entirety, to show how unfounded the defendants' motion is on that ground, your Honor, we sincerely urge that it is absolutely unfounded.

Now, as to the statute of limitations, and the waiver, and so on:

In the first place, of course, being a class plaintiff, this plaintiff himself cannot waive the rights of any other stockholders. However, in addition to that——

The Court: I wonder if he can properly be a class plaintiff in a diversity case. The only basis for the jurisdiction of this court is diversity of citizenship, and most of the stockholders would be expected to be citizens of [94] California, because the owning of stock is incident, or usually incident to the holding of land in a residential community,

and most of it is residential land. Now, with a California corporation, and the shareholders being largely California citizens, can you have him appear in a class suit in this court?

Mr. Lucking, Jr.: I think you can, your Honor, but we haven't any cases at the moment on it.

I wanted to bring up this waiver matter, at any rate. It is completely unfounded, and the case of *Copeland v. Fairland Land*, 165 Cal. 148, which has been cited previously for other grounds and for other reasons, and which is in our briefs, states in effect, that a mere contract right may be barred by laches or the statute of limitations, but where, as in this case, and in the *Copeland* case, which is very close to this—but where, as above, there is a vested right, in other words, in this land and in the stock. That is a different matter, and the right may be lost only in the manner that other vested property rights may be lost.

The Court: That is just another form of the old rule that the mere lapse of time will not cure a void act?

Mr. Lucking, Jr.: Yes, your Honor, the mere lapse of time will not cure the void act, in so far as the void amendment is concerned.

Surely, that is one aspect of it. Another aspect of it [95] is that you cannot take away a person's vested property right merely because that person hasn't done something. You have to comply with the formalities of the law to take away such a right.

In other words, if I own a lot down the street, and I leave it there, and don't do anything, or say

anything about it, if I come back in 10 years, and if I have paid my taxes on it and complied with the requirements of the law, whatever they happen to be, that is still my property.

Now, on the matter of waiver, and so on, this Imperial Water Co. No. 5 v. Holabird, 197 Fed. 4, which we cited before, and which I submit to your Honor is a very important and interesting case, and which very closely parallels our case, here, states in part, and I am not quoting, that the settlers in that case could not be said to have voluntarily contracted with this defendant water company, since this was the only adequate supply of water. [96]

In other words, in the Holabird case the judge said, "These fellows are entitled to come in here and settle that land and when they make a contract with the water company, they are not waiving any rights. They are entitled to these certain rights, which equity gives them."

In the McDermont v. Anaheim Union Water Company case, 124 Cal. 112, previously cited, there is authority for saying that a void amendment is void ab initio. Notice of the lapse of time because of this amendment or any different stock distribution in the 1935 amendment was void, which, for the purposes of this motion, has been decided by your Honor; there can't be any waiver, either. In other words, it was void initially, if we act under it.

Now, I might make a comment about this second action. I hope it is to save time.

Counsel says there was a mere allegation of an undercharge and no specified rates. I think counsel,

in view of his previous motions in this case, would have been the first to move to strike any specification of rates as being merely evidentiary. We will put on proof, but the allegations are complete.

Furthermore, control and common ownership or ownership of the country club and so on have all been pleaded, anyway, so we have the basis there for equitable relief under all the cases. [97]

I don't think there can be any question about that. Since this matter of notice, your Honor, has been taken care of by your ruling on the motion, I don't see that anything further has to be mentioned on it, except that this Bogert case—I would like to cite that to you—does go to this whole aspect of the motion, and although it touches on the 1935 amendment, the effect of it still goes to the rest of the motion, too.

I told your Honor, pointed out in the opening statement, that even if there had have been notice as required by law this 1935 amendment, it was still void for that reason. I will just merely quote part of the language from this case of Southern Pacific Company v. Bogert, 250 United States Reports, 438, at page 491 and 492.

Mr. Hollingsworth: 250 what?

Mr. Lucking, Jr.: 250 United States Reports, 438.

“Equally unfounded—” this is from the head-notes “—is the contention that the Southern Pacific Company cannot be held liable because it was not guilty of fraud or mismanagement. The essential

of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits [98] which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a prorata distribution on equal terms among the old Houston Company shareholders.”

It is that principle that we are talking about when we say that this notice, although it helps, is not necessary, in other words, a finding of this notice question in our favor. Thank you, your Honor. I think that that takes care of everything I have to say now.

The Court: To keep our record straight then, the motion is denied as to the question of the validity of the amendment to the Articles of Incorporation, and the court will keep it under submission as well as all other matters.

Mr. Hollingsworth: I would like to point out the other two—not the amendment, your Honor—you have expressed your position relative to the amendments.

On these other two matters here relative to setting up the exhibits, I have just checked the complaint. Those exhibits, the Articles of Incorporation, the amendment to the Articles of Incorporation, the deed, et cetera, that were issued to Mr. Lucking are all set forth as exhibits and they are part of the plaintiff's complaint.

Now, he wants the court now just to take the position, sort of cursorily to the effect it is just for information for the court. But he has made them a part of his pleading, [99] your Honor, and it becomes a matter of law as to what the Articles provide.

The Articles on their face expressly state that the stock is not appurtenant. There is no restriction on the service of any lands within the service area, as contended for by them. That is a matter of law set forth in their own complaint.

On the issue of the class action, we moved to dismiss here at one time upon the ground there had been no compliance with—I have the section there, I brought the Rules with me. I am not as familiar with those Rules as I should be, because I don't appear in the federal court often enough to call them off. But I know there is a rule there that requires that certain action be taken which wasn't taken, so far as the class plaintiffs category, the plaintiff tried to put himself in, is concerned, your Honor's further observation relative to his class action, I think, is very pertinent.

On the issues of appurtenants issue to the lands, on the issue who is entitled to water in the service area, it is purely a question of law governed by the Articles of Incorporation.

Now, if the amendment is invalid, that is one thing. But the other two are certainly questions of law and a great deal of time can be saved by this court by holding him to his pleading. That is our contention. [100]

The Court: Your motion to exclude the taking of evidence on those is held under submission.

Mr. Hollingsworth: Yes, I realize that, your Honor. I realize that.

The Court: I am only opening the door at the moment to evidence on this matter to the amendment to the Articles.

Mr. Lucking, Sr.: Would your Honor permit me to make one suggestion that may be helpful as we go along?

The Court: Yes.

Mr. Lucking, Sr.: Or would you prefer we call our first witness and get going? I don't care. I would like to make one suggestion. It will only take two minutes.

The Court: Go ahead, sir.

Mr. Lucking, Sr.: Because it probably is that I have lived with these matters——

Mr. Hollingsworth: Counsel, which case are you addressing yourself to? Is it the case you appear in *propria persona* or the other case?

Mr. Lucking, Sr.: Have it your own way. The second case, for the purpose of your suggestion.

Mr. Hollingsworth: I wanted to be sure.

Mr. Lucking, Sr.: I don't suppose the court would deny me the right to act as of counsel even in the first case, and be heard. I don't think so. If I am not too wrong in my statements, that is. [101]

The Court: I haven't been called upon to rule on that question.

Mr. Lucking, Sr.: What I want to suggest to

the court is this:—And for the benefit of counsel, it will be very brief—there is no use my reading a mass of cases on the subject of almost universally that courts—as your Honor probably knows better than I do—have set aside any kind of a device engineered by the majority to perpetuate a control of a corporation which operates detrimentally to the minority or any part of the minority.

Mr. Hollingsworth: Of course, I want to object at this time. Mr. Lucking is merely taking up the time of the court here, addressing your Honor on a matter he doesn't appear as counsel in.

He is a party to that particular phase of that litigation and he is represented by his own son as his counsel. I object to the court's time being taken up at this time by Lucking on that phase of the case. [102]

The Court: Well, that is the first case, Mr. Lucking, in which you are not counsel. However, if your son wants to associate you as counsel, I will permit him to do so.

Mr. Lucking, Jr.: I will be very happy to, your Honor.

The Court: All right. Speak now as associate counsel in the first case.

Mr. Lucking, Sr.: I thought it would save the court's time and maybe counsel's time, that is all. That is all I want to say at this time, is that I think the issue that has been argued before your Honor, as to whether, for lack of certain formalities under the statute, this amendment is void or voidable or can be enforced is a pertinent issue, of

course, but it is not the greatest issue, as I see it.

The greatest issue is whether that amendment was enacted, not only as to previous stockholders to March, 1935, but as to all subsequent bona fide stockholders of the Water Company, as a mere device to enable this Valley Company to perpetuate its control after it had sold all its land and had ceased to have any real interest in the question.

Now, that is a subject which has not anything particularly to do with the lack of some legal requirement in the filing of the amendment, the making of the amendment or notice or lack of notice.

It is a device that the courts have uniformly set aside as intended to nullify in part or whole the rights of the [103] minority under the obvious advantage of everybody having a proper voice in order to vote for their own directors.

In other words, is it a mere device to perpetuate control in the interest of a certain segment of the Water Company stockholders, namely, the majority as it stands today? That is a vital question.

It is a question of fact, from all the facts, and I want one moment more because I am perfectly willing—and it will come up shortly—the Articles of the Association, which counsel refers to as a portion of the Complaint—those are the original Articles provided in 6, that “The amount of the capital stock of said corporation is \$150,000.00 and the number of shares into which it is divided is 3,000 shares of par value of \$50.00.”

The pleadings show, the facts will show and all

the circumstances surrounding that day, and I think since practically the organization of the Water Company, the total issued and outstanding shares numbered 2,003. The unissued but authorized shares 997.

Now, as we progress it will appear very clearly, as a matter of simple arithmetic, that there was no necessity whatever from the point of view of this controlling stockholder, the Valley Company, to ever make this amendment, cutting back from four shares per acre to one share.

All they had to do, if they wanted a few more shares [104] to complete their object and their purpose, as the proofs will show, would be to issue under a resolution of the board three or four or five hundred of this unissued stock and give each of the stockholders his peremptory right to buy and the Valley Company would have had the right, as I remember it, of about, a number of shares outstanding when the amendment was made, I think what they held was five-sixths of the issued 2,003 shares. They therefore would have the peremptory right, if they wished to pay and buy that much stock, or 500 shares.

The other stockholders would have had a right to buy their proportion. They would never have had a right to buy stock which could be used later on to the detriment of the homeowners if the amount of water was insufficient, so that they could expand as they are talking about sometimes. Their original purpose of providing water for these lots and a few friends, they can't ever do that if it hurts the present stockholders, no matter how much

stock they have got. They didn't need any amendment or anything, just the simple issuance of some more of the stock and everybody would have had a right to buy their peremptory shares, and there wouldn't have been any necessity to change from four to one, which I claim was a device to perpetuate control and operates against the real interest of the minority owners and homeowners, which we have a perfect right and duty to ask the [105] court to cancel. That will come up later and we might as well have it before the court and counsel.

Mr. Hollingsworth: There is nothing in the Complaint that indicates any such issue here as stated by Mr. Lucking. He is trying to impress upon the court the fact that because we permitted one share of stock per acre of land and allege and set forth in our pleading we did it because of the fact that there was a progressive growth and development there in the area, and that water service was in demand and that we had to cut down on the shares of stock that had been issued at that time. [106]

Now, there is nothing in law or in equity that requires us to issue new stock. It was a matter of business judgment on the part of the directors of the corporation, and it is presumed that they act in good faith, and for the best interests of the entire corporation, as well as Mr. Lucking, and the assumption and the inference and conclusion on his part that everything that was done was unjustly, inequitably or fraudulently done will not be borne out.

We take the opposite position, and this is another

interjection and another factor not set forth in the pleadings here.

* * *

Mr. Lucking, Jr.: I would like to call Mr. C. J. Wilcox as an adverse witness, under the Federal Rules of Civil Procedure, Section 43(b), he being an officer and director of both defendant corporations.

Mr. Hollingsworth: Just come forward, Mr. Wilcox.

Mr. Lucking, Jr.: And I wish to question him as if [107] under cross-examination.

CHARLES JUSTUS WILCOX

called as an adverse witness under Section 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

The Clerk: Your name, sir?

The Witness: Charles J. Wilcox. Do you want the middle name? It is Justus, J-u-s-t-u-s.

Examination

By Mr. Lucking, Jr.:

Q. Mr. Wilcox, you are by your friends familiarly known as Justus, are you not? A. I am.

Q. Where do you reside, Mr. Wilcox?

A. Toledo, Ohio.

Q. How long have you lived there?

A. Since my birth, 76 years ago.

Q. Have you ever lived in the Ojai Valley?

(Testimony of Charles Justus Wilcox.)

A. No, only I am here for vacations occasionally.

Q. I see. Now, you are an officer of The Ojai Valley Company, are you not, Mr. Wilcox?

A. I am.

Q. What office do you hold, please?

A. I am president and treasurer.

Q. How long have you held that office, Mr. Wilcox? [108]

A. I have been treasurer since the incorporation of the company, and president since the death of Mr. Libbey in 1925.

Q. And you are also a director, are you not?

A. A director, yes, sir.

Q. How long have you been a director, please?

A. Since the incorporation of the company in 1922. That is the Ojai——

Q. The Ojai Valley Company?

A. The Ojai Valley Company, that's right.

Q. Now, as to the Ojai Mutual Water Company, you are also an officer of that, are you not, Mr. Wilcox?

A. I am president and treasurer.

Q. Now, how long have you been treasurer of the Ojai Mutual Water Company?

A. From its incorporation, in 1920, I believe.

Q. And how long have you been president?

A. Since—I am not sure, but I think it was about a year after Mr. Libbey's death in 1925. I think there was a lapse there.

Q. You are also a director, are you not, of the Ojai Mutual Water Company?

A. I am.

(Testimony of Charles Justus Wilcox.)

Q. How long have you been a director, please?

A. Since Mr. Libbey's death. [109]

Q. In 1925, about? A. Yes, sir.

Q. Now, you have been connected for many years with the Libbey family, have you not, and the Libbey estate?

A. Yes. I went into Mr. Libbey's employ as a personal secretary in 1908.

Q. And how long did you act in that capacity, Mr. Wilcox? A. Until his death.

Q. In 1925? A. Yes.

Q. And what position have you held since then with regard to the Libbey interests, if any?

A. On Mr. Libbey's death, I was one of the executors appointed and placed in management of the estate.

Q. Do you have any position now?

A. I am one of six trustees of the estate, and the manager.

Q. Now, you have been one of the trustees since shortly after Mr. Libbey's death; is that correct?

A. Yes, just as soon as the trusteeship was taken into the Probate Court, which was about two years, while the executorship was being completed.

Q. Now, where did the other five trustees reside, if you can remember? [110]

A. Where did they reside?

Where do they reside now?

A. They reside in Toledo.

Q. Have there from time to time been replacements of those six trustees?

(Testimony of Charles Justus Wilcox.)

A. Yes, as trustees died or left the trust, the remaining trustees elected the successors.

Q. Other than yourself, Mr. Wilcox, are there any trustees still acting as such, who were originally trustees in about 1927?

A. There is no other survivor.

Q. Now, do you trustees have an organization, as such? Do you elect a chairman, for example?

A. Yes, we have a chairman, secretary and treasurer.

Q. What office have you held, if any, of those?

A. I have been secretary and treasurer ever since the court okayed my appointment. We are all appointed by the will, named in the will originally.

Q. And you have acted in the capacity of secretary and treasurer ever since 1925, then; is that correct?

A. I have.

Q. Is that correct?

A. I have. I am also manager of the estate.

Q. How long have you been manager?

A. Since the time of appointment; a month or two after [111] we were appointed.

Q. Is that a salaried job?

A. Yes, I receive a salary for my managerial work.

Q. What generally do your managerial duties consist of, Mr. Wilcox?

A. Oh, taking care of the real estate that was in the estate, and the securities, and the investment of the funds, and the paying out of authorized pur-

(Testimony of Charles Justus Wilcox.)

chases, authorized expenses, salaries—we have some salaries—and taxes, and court fees.

Q. How often do these trustees meet in a body?

A. It is irregular. As the demand is——

The Court: I don't think that it makes any difference on the issue we are trying now, how often they meet. We are trying the circumstances of the amendment to the articles of incorporation, or what has been claimed to be an amendment, and the giving of notice that it was to be considered at a meeting held way back in the '30s.

Mr. Hollingsworth: In 1935.

The Court: Yes.

Mr. Lucking, Jr.: If the court please, there are a great many other issues involved. I don't think the question which I asked is too vital. It all bears, however, on the extent to which Mr. Wilcox himself has been able to manage these corporations, and it goes to the question of who [112] controls the corporation.

Mr. Hollingsworth: Your Honor——

The Court: We are not trying that issue now.

Mr. Hollingsworth: That would not prove the validity or non-validity of the amendment, Your Honor. I am willing to stipulate that Mr. Wilcox is thoroughly familiar with the operation and management of The Ojai Valley Company, and has been since its organization, if that is what you are trying to prove.

Mr. Lucking, Jr.: Excuse me. Your Honor, I understood we had started the trial of this case as

(Testimony of Charles Justus Wilcox.)

a whole, not on the general issue of whether the amendment is valid, and——

The Court: I did not make myself clear, then. I reserved ruling on the motion to exclude evidence on all the other issues, and have denied it upon the issue having to do with the amendment.

Mr. Lucking, Jr.: Well, if Your Honor please——

The Court: We are taking evidence now on the matter of the amendment.

Mr. Lucking, Jr.: If Your Honor please, to be very honest with you, if we have to try that one narrow issue first, it will throw us badly out of stride. We have other witnesses we instructed not to appear until we called for them.

We understand, or I do, that the general rule of presenting [113] witnesses, Your Honor, in the presentation of the plaintiff's case, is to take each witness, develop his testimony fully, and then have done with him.

Now, we can, if Your Honor so rules, re-tailor the case and try this one narrow issue of whether or not the 1935 amendment was valid.

The Court: That is the issue we are trying now, and we will not try any other issues until we have that one tried.

Mr. Lucking, Jr.: Well, Your Honor——

The Court: I think there is a considerable question as to whether the other issues are entirely legal, and I want to have this one tried first, and then to rule.

(Testimony of Charles Justus Wilcox.)

Mr. Lucking, Jr.: Excuse me just a moment.

Q. (By Mr. Lucking, Jr.): Is it not a fact, Mr. Wilcox, that during your trusteeship the trustees in Toledo have for the most part left all matters regarding Ojai property, in other words, The Ojai Valley Company and the Ojai Mutual Water Company, up to you?

A. I don't think that is any item in this case. I think the evidence of operation of these companies is that they have been operated properly. [114]

Mr. Lucking, Jr.: Excuse me. Mr. Wilcox apparently didn't understand my question.

Miss Reporter, will you repeat it, please?

(The question was read.)

Mr. Hollingsworth: I assume the question is preliminary, Mr. Lucking.

Mr. Lucking, Jr.: This is on cross-examination, Mr. Hollingsworth.

Mr. Hollingsworth: I understand that. But the question is preliminary, isn't it, leading up to what was done relative to the amendment?

Mr. Lucking, Jr.: Yes.

Mr. Hollingsworth: All right.

The Court: Will you please answer that question?

The Witness: Well, I wouldn't swear that everything that has been done here has been under my direction, because many times I am not consulted in emergencies until the thing is cured, whatever it is.

(Testimony of Charles Justus Wilcox.)

The Court: What he wanted to know was whether the other people in the corporation back in Toledo have left things generally up to you.

The Witness: As a matter of fact, to a large extent they have, because I know the Ojai; I have been coming out here since 1915.

Q. (By Mr. Lucking, Jr.): Mr. Wilcox, if you were not [115] available, as you just pointed out, and the defects were cured, who cured that defect?

A. It was cured from here.

Mr. Hollingsworth: That is objected to. It is purely——

The Court: It is pretty general.

Mr. Hollingsworth: Yes. It is not specific.

The Witness: I don't know as I would even know that.

Mr. Hollingsworth: It doesn't have any relevancy to this particular issue.

The Court: Objection sustained.

The Witness: He hasn't asked me——

The Court: You just answer questions.

Mr. Hollingsworth: He sustained the objection, Mr. Wilcox.

The Witness: All right.

Q. (By Mr. Lucking, Jr.): If you were not available, Mr. Wilcox, and an emergency came up, as you testified to a few minutes ago, who in your organization had authority to act in your stead?

Mr. Hollingsworth: I object to putting into the question the word "emergency," Your Honor, as not having any bearing on the issues.

(Testimony of Charles Justus Wilcox.)

The Court: Objection sustained. We are taking a long time to get down to the limited issue that is to be tried here today. [116]

Q. (By Mr. Lucking, Jr.): Well, Mr. Wilcox, immediately prior to March of 1935 and during March of 1935, you were a director, were you not, of The Ojai Valley Company?

A. So far as I remember, I was.

Q. You were also a director of the Ojai Mutual Water Company, were you? A. I was.

Q. Who were the other directors, please?

A. The other directors of the Mutual Water Company were Mr. Harmon, Mr. Sinclair, I think at that time, Harry Sinclair, who is dead now.

Q. Now, who were the directors at that time of The Ojai Valley Company?

A. I don't believe I could answer that because there have been a lot of changes and I don't remember them.

They are the same directors ordinarily that the trustees are. As they change we changed the directors of the companies they are managing under the trusteeship.

Q. Now, how many shares of stock in March of 1935 in the Ojai Mutual Water Company were held by The Ojai Valley Company?

A. I couldn't answer the exact number, because I have to rely on my memory. I would have to see something to help me.

Mr. Lucking, Jr.: If Your Honor please, coun-

(Testimony of Charles Justus Wilcox.)

sel read a [117] figure which I did not take down a few minutes ago.

Can you supply that?

Mr. Hollingsworth: At the time of the amendment, Mr. Lucking, there were 1,704, I think it was—just a minute. 1,740 shares of the 2,003 shares at the March 4, 1935, meeting were represented. I don't know who owned them, but 1,740 shares out of the 2,003 shares were represented at that meeting, according to the minutes.

Q. (By Mr. Lucking, Jr.): Did you, Mr. Wilcox, have the power to vote those shares at that meeting? A. I did.

Q. I am referring to the 1,740 shares in Ojai Mutual Company.

A. No, sir, I didn't have—there were other owners that had taken stock previously. I don't know how many there were.

Q. Your attorney referred to 1,740 shares in Ojai Mutual Water Company, which were held at that time by The Ojai Valley Company—

Mr. Hollingsworth: No, I didn't say that. You misunderstood me. I said at the meeting, when the amendment was adopted, the minutes show that 1,740 of the outstanding shares of the corporation Water Company were represented at the meeting, but it doesn't say who owned the 1,740 shares.

I will stipulate they had a majority of the shares. but [118] just what that majority was I can't state at this time.

(Testimony of Charles Justus Wilcox.)

Mr. Lucking, Sr.: Do you have the minutes here?

Mr. Lucking, Jr.: If we could borrow the minutes of the meeting, Your Honor.

Mr. Hollingsworth: I will have to get them out here.

Mr. Lucking, Jr.: They were subpoenaed.

Mr. Hollingsworth: We have them here. March 4, 1935.

Mr. Lucking, Jr.: Thank you. Your Honor, we offer these minutes for identification and only as a part of the cross-examination.

Mr. Hollingsworth: Which minutes, you mean March 4, 1935?

Mr. Lucking, Jr.: That is correct. In other words, we do not know the contents of them and I don't intend to become bound——

The Court: What you are really doing is having the book, which Mr. Hollingsworth handed you as the minutebook, marked for identification?

Mr. Lucking, Jr.: Yes. I prefer to have the whole book marked for identification. We will be referring to it later, anyway.

Mr. Hollingsworth: That will be Plaintiff's 1 for identification.

The Clerk: Plaintiff's 2.

(The document referred to was marked Plaintiff's Exhibit 2 for Identification.) [119]

Mr. Lucking, Jr.: But only, Your Honor, as part of the cross-examination. We are not asking—as

(Testimony of Charles Justus Wilcox.)

to something to which we are necessarily bound——

The Court: You are not offering it into evidence now, as I understand.

Mr. Lucking, Jr.: We don't want to take a chance, Your Honor.

What page was that, again?

The Clerk: I believe it was 90.

Q. (By Mr. Lucking, Jr.): Mr. Wilcox, I show you this minutebook. I assume you are familiar with it, are you not?

Referring specifically to page 90 of the minutebook, at the top of which it states, "Annual Meeting of Stockholders of Ojai Mutual Water Company, March 4, 1935."

Does that appear to you to be in order, Mr. Wilcox?

Mr. Hollingsworth: I object to whether it is in order or not. Are they the minutes?

Q. (By Mr. Lucking, Jr.): Are they the minutes?

A. They seem to be the minutes of March 4, 1935. As to the exact contents of those minutes, the wording of them and so forth, I haven't the slightest recollection; it is too far back.

Q. Now, I refer you to a portion about the middle of the page, which I will ask that you read to the Court, starting, "Upon roll call," and ending here (indicating), [120] with the words "ordered filed."

A. "Upon roll call it was found that a total of 1,740 shares out of a total of 2,003 shares of the

(Testimony of Charles Justus Wilcox.)

outstanding and issued stock of the corporation, were represented, either in person or by proxy, as follows:

“C. J. Wilcox owning and holding one share.

“H. T. Sinclair owning and holding one share.

“C. J. Wilcox holding the proxy of Florence Scott Libbey for 326 shares.

“C. J. Wilcox holding the proxy of The Ojai Valley Company for 1,412 shares.

“Said proxies are read, found to be in order, and ordered filed.”

Q. Thank you, Mr. Wilcox. Were there any other stockholders present?

A. I have no recollection now. It is too far back.

Q. Do the minutes refer to any others?

Mr. Hollingsworth: The minutes speak for themselves.

Mr. Lucking, Jr.: I am asking him to speak, counsel.

The Witness: No other names mentioned in the minutes, in these minutes (indicating).

Q. (By Mr. Lucking, Jr.): Now, will you examine the minutes and state whether or not there is any recital of any notice having been given of the meeting?

Mr. Lucking, Jr.: Will counsel stipulate there is no such reference? [121]

Mr. Hollingsworth: The minutes speak for themselves, Mr. Lucking. I don't know.

Mr. Lucking, Jr.: Will counsel stipulate that the minutes of the meeting referred to here, of March

(Testimony of Charles Justus Wilcox.)

4, 1935, may be copied into the record by the reporter in full, without having to read them——

Mr. Hollingsworth: Oh, surely.

Mr. Lucking, Jr.: ——at length into the record?

Mr. Hollingsworth: Surely, I have no objection to that at all.

Mr. Lucking, Jr.: All right.

The Court: You are offering them into evidence by that means rather than taking them out of the book and having them physically received into evidence?

Mr. Lucking, Jr. I think that would be better than detaching them, Your Honor, if that is satisfactory.

The Court: They may be received in that manner. [122]

(The minutes of the Annual Meeting of Stockholders of Ojai Mutual Water Company of March 4, 1935, are in words and figures, as follows, to wit:)

Annual Meeting of Stockholders
of Ojai Mutual Water Company

March 4, 1935.

The regular annual meeting of the stockholders of the Ojai Mutual Water Company is called and held pursuant to the By-Laws of the corporation on Monday, March 4th, 1935, at the hour of 2:00 o'clock p.m. at the office of the corporation in the City of Ojai, County of Ventura, State of California.

(Testimony of Charles Justus Wilcox.)

C. J. Wilcox, President of the corporation acted as temporary chairman of the meeting and called the meeting to order; Douglas E. Burns, appointed as secretary pro tem, acted as secretary of the meeting.

Upon roll call it was found that a total of 1740 shares out of a total of 2003 shares of the outstanding and issued stock of the corporation, were represented, either in person or by proxy, as follows:

C. J. Wilcox owning and holding 1 share.

H. T. Sinclair owning and holding 1 share.

C. J. Wilcox holding the proxy of Florence [123] Scott Libbey for 326 shares.

C. J. Wilcox holding the proxy of the Ojai Valley Company for 1412 shares.

Said proxies are read, found to be in order, and ordered filed.

The chairman of the meeting thereupon announced that a quorum is present and that the meeting is qualified to proceed.

The minutes of the last meeting of stockholders, being minutes of the annual meeting thereof held March 5th, 1934, and also the minutes of the regular organization meeting of the Board of Directors held on the same date, were read and approved.

Matter of Financial Statement

A financial statement of the corporation as of date December 31st, 1934, is presented and read. Upon motion duly made and seconded, it is ordered that said report be, and the same is hereby accepted

(Testimony of Charles Justus Wilcox.)

and approved and ordered filed and entered in these minutes. A full and correct copy of said statement appears on a succeeding page of these minutes.

Resolution Adopting and Approving Amendment of Articles of Incorporation

Whereas, it is deemed by the shareholders of this corporation to be to its and to their best interests that its Articles of Incorporation be [124] amended to provide that any stockholder desiring to use and using water of the corporation shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof, to which said water is to be delivered for use thereon instead of one share for each one-quarter acre of land or fraction thereof.

Now, Therefore, Be It Resolved that the second paragraph of the Article designated as "Second" of the Articles of Incorporation of this corporation be amended to read as follows:

"Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above-described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the By-Laws of the company may de-

(Testimony of Charles Justus Wilcox.)

termine. Mere ownership of stock in said company or of land situated within the above [125] described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible.”

Resolved Further that the shareholders of this corporation hereby adopt and approve said Amendment of its Articles of Incorporation.

The adoption of the foregoing resolution having been duly moved and seconded and a vote thereon being taken, the same was unanimously adopted.

Matter of Amendment to By-Laws

The following resolution is proposed and upon motion duly made and seconded, unanimously adopted, to wit:

Whereas an amendment to the Articles of Incorporation has been adopted and approved to provide that any stockholder of the corporation shall be the owner of at least one share of the capital stock of the corporation for each acre of land or fraction thereof, to which said water is to be delivered for use thereon, instead of one share for each one-quarter acre of land or fraction thereof.

Now, Therefore, Be It Resolved that in order to make the By-Laws of the corporation conform in this regard, it is ordered that said By-Laws be and they are hereby amended in the following respects:

In Article XIV. Subdivision A, at page 9 [126] insert between the word “of” and the word “one” in the eighth from the last line on said page, the

(Testimony of Charles Justus Wilcox.)

words "at least," and in the seventh from said last line strike out the words "one-quarter."

In the same Article, subdivision B, at page 10, in the sixth from the last line on said page between the word "of" and the word "one" insert the words "at least" and strike out the word "one-quarter."

In the same Article, subdivision E, at page 13, in the fifth line between the word "of" and the word "one" insert the words "at least" and strike out the word "one-quarter."

Matter of Election of Board of Directors

Thereupon followed the election of the Board of Directors for the ensuing year. C. J. Wilcox, H. T. Sinclair and T. Ernest Clark are nominated for membership on the Board and a vote being had, each of said persons received 1740 votes and thereupon the presiding officer declared that said persons are elected as Directors of the corporation for the ensuing year and until their successors are elected and qualified.

Matter of Approving Acts of Directors and Officers

Upon motion duly made and seconded it is unanimously ordered and resolved that all of the acts of the Directors of the corporation and of the officers thereof as [127] appearing in the previous minutes since the date of the last annual meeting of stockholders be and the same are hereby ratified and approved.

(Testimony of Charles Justus Wilcox.)

There being no further business before the meeting, the same adjourned.

Approved:

/s/ H. T. SINCLAIR,
Vice President.

Attest:

/s/ DOUGLAS E. BURNS,
Secretary. [128]

Q. (By Mr. Lucking, Jr.): Mr. Wilcox, was Mr. Harmon present at that meeting?

A. There is no mention in the meeting of his being there. In fact, it doesn't mention any individual.

Q. Do you have any independent recollection of whether or not Mr. Harmon was there at that meeting? A. No, I have not.

Q. Do you have any independent recollection of the meeting at all?

A. I believe I testified to that effect.

Q. I would like to have you answer it, Mr. Wilcox. I don't believe you did. A. Well——

Mr. Lucking, Jr.: Miss Reporter, would you read the question, please?

(The question referred to was read.)

The Witness: No, I don't know. I know it occurred, that's all, from correspondence which I could not locate.

Q. (By Mr. Lucking, Jr.): Now, Mr. Wilcox, in your deliberations, you yourself, as a director of

(Testimony of Charles Justus Wilcox.)

Ojai Mutual Water Company, over the question of whether or not to amend these articles, did you consider the difference, if any, in the final result to be achieved between passing the 1935 amendment in the form shown in those minutes, wherein, in practical effect, the requirements of four shares per acre were reduced [129] to one share per acre, and, on the other hand, the effect of amending the articles to provide for an authorization of, say, an additional 4,000 shares, and then issuing those 4,000 shares to the Ojai Valley Company?

Mr. Hollingsworth: I object to that question, may it please the Court. That is not relevant as to whether or not the amendment was valid or invalid.

Mr. Lucking, Jr.: It has a very, very great effect on it, Your Honor.

The Court: How? We are talking about the physical adoption of an amendment.

Mr. Lucking, Jr.: Your Honor please, we have contended all along that this 1935 amendment—as to whether or not it is valid—depends upon two things: One, a pure issue of law, of whether controlling stockholders can pass such an amendment and thus perpetuate control. The other one is a mixed question of fact and law, as to whether or not notice was required. It is a two-headed question, Your Honor.

The Court: Objection sustained. Recess until 2:00 o'clock.

(Thereupon, at 12:00 o'clock, noon, a recess was taken to 2:00 o'clock, p.m., of the same date.) [130]

Tuesday, May 31, 1955—2:00 P.M.

Mr. Lucking, Jr.: Your Honor please, I apologize to the Court for apparently being a little thick, but is it the Court's ruling that we are trying now the single issue of fact, of whether or not statutory notice was given of 1935 amendment?

The Court: Whether or not the notice required by law was given and if notice was required by law. We are trying that issue respecting—to determine, as a matter of fact, what the factual situation was respecting notice, and then what the legal result of that factual situation is.

Mr. Lucking, Jr.: All right, Your Honor. That being the case, Your Honor, I have just one further question to ask Mr. Wilcox.

Mr. Hollingsworth: Will you come forward, please, again, Mr. Wilcox.

The Court: If it is only one question, ask him where he is. If you mean that as lawyers usually do, a short series of questions, we will have him back on the stand.

Mr. Lucking, Jr.: I will ask him right here, Your Honor, if it is all right, and Mr. Wilcox doesn't mind.

CHARLES JUSTUS WILCOX

the witness on the stand at the time of adjournment, being heretofore duly sworn, was examined and testified further as [131] follows:

Examination

(Continued)

By Mr. Lucking, Jr.:

Q. Mr. Wilcox, you as president and director of Ojai Mutual Water Company in 1935, when the phrase was used in the minutes, the meeting was held "pursuant to the by-laws," what does that mean to you as an officer, as president and director?

Mr. Hollingsworth: I object to that. It would purely be a conclusion of the witness, Your Honor. The by-laws speak for themselves, and we have them here.

The Court: Sustained.

Mr. Lucking, Jr.: No further questions of Mr. Wilcox, except that we reserve the right, Your Honor, if the Court please, to recall him for any further cross-examination for any of the other issues.

The Court: Surely.

(Witness excused.) [132]

Mr. Lucking, Jr.: I will call Mr. Lucking, the plaintiff.

WILLIAM ALFRED LUCKING

the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Clerk: Your full name, sir?

The Witness: William Alfred Lucking, L-u-c-k-i-n-g.

Direct Examination

By Mr. Lucking, Jr.:

Q. Where do you reside, please, Mr. Lucking?

A. In Washtenaw County, Michigan.

Q. Are you a stockholder of the Ojai Mutual Water Company? A. I am.

Q. How long have you been a stockholder, Mr. Lucking?

A. Well, since the first purchase from Mrs. Libbey in 1928. I believe the shares were issued probably when the contract of purchase was signed and entered into, and possibly held until the purchase price was completed.

Q. From that time until this date is it true that you have been a stockholder continuously in Ojai Mutual Water Company? A. Yes, sir.

Q. Mr. Lucking, did you receive any notice whatsoever of the 1935 stockholders meeting of the Ojai Mutual Water [133] Company?

Mr. Hollingsworth: I object to that question, Your Honor, upon the ground that it is incompetent and irrelevant at this time, and no proper foundation laid. It isn't a question of whether or not he

(Testimony of William Alfred Lucking.)

received notice. The question is, was there a failure to send out a notice.

The Court: Suppose he says, "Yes, I received one." Then that would be some evidence of what was sent out.

Mr. Hollingsworth: That would be some evidence, but, on the other hand, if he said he did not receive one, it would be no evidence that one was not sent.

The Court: It may be that it would not be sufficient evidence to show that one had not been sent, but it would be some evidence in that direction, and if properly connected up, it could support other evidence, or be supported by other evidence, to the extent that the Court could draw an inference one way or the other, so the objection is overruled.

The Witness: Will you repeat the question, please?

Mr. Hollingsworth: Did he answer the question?

Mr. Lucking, Jr.: He asked that the question be repeated.

(The question was read.)

The Witness: No, sir, neither written nor verbal, from any source.

Q. (By Mr. Lucking, Jr.): Mr. Lucking, during your [134] entire time as a stockholder of the Ojai Mutual Water Company, have you ever at any time received any notice as a stockholder from the Ojai Mutual Water Company?

(Testimony of William Alfred Lucking.)

Mr. Hollingsworth: That is immaterial, Your Honor. That is not the issue here.

The Court: Overruled. I think the things you have in mind, counsel, might go to the weight, but I believe that within the area of admissibility the interrogation is proper.

The Witness: I would like to have the question repeated again.

Mr. Lucking, Jr.: Miss Reporter, will you read the question?

(The question was read.)

The Witness: Well, no notice of any corporate meeting or stockholders meeting, or anything of that sort. I probably got notices at times of water rates that were not paid, and things like that, but that is all. [135]

Mr. Hollingsworth: I move that last be stricken as not responsive, Your Honor.

The Court: Motion granted. No, I will take that back. Although not responsive, it is something which could have been elicited by a proper question, so I will let it stand.

Q. (By Mr. Lucking, Jr.): Mr. Lucking, have you ever at any time, when you were a stockholder, received any financial notices from Ojai Mutual Water Company, other than bills and delinquent statements possibly?

Mr. Hollingsworth: We make the same objection on the ground it is irrelevant and immaterial on the issue now before the Court.

(Testimony of William Alfred Lucking.)

Mr. Lucking, Jr.: Your Honor please——

The Court: I will overrule it. But I think these things, other than the notice of the type which is involved or contended to be involved on this issue, should not be gone into very extensively.

Mr. Lucking, Jr.: All right. I will apologize, Your Honor. Withdraw the question.

The Court: Answer the question.

The Witness: I have never received any report of any kind as a stockholder of the Water Company from any of the officers of the company on any subject of any kind, that I know anything about, either an annual report or report of conditions, or a report of water shortage in 1948, or the [136] new well, or anything else as a stockholder.

Mr. Hollingsworth: We ask that that latter part of the answer be stricken out, Your Honor. It is purely a voluntary statement on the part of the witness and not within the issues now before the Court.

The Court: Beginning where?

Mr. Hollingsworth: Well, back there where he said he never received any notice of any kind relative to the condition of the company or relative to a water shortage; following that.

Relative to receiving any notices from the company concerning its condition or water shortage in 1948, and then he made some other voluntary statement; I don't remember just what it was.

The Court: All right. Motion granted.

Q. (By Mr. Lucking, Jr.): Mr. Lucking, did you ever talk to Mr. Harmon about the 1935 amendment, so-called?

(Testimony of William Alfred Lucking.)

A. I never knew about the 1945 amendment——

The Court: You said 1945. Did you mean '35?

The Witness: I meant '35, Your Honor.

The Court: I thought you misspoke yourself.

The Witness: I had in mind fixing the date. I never knew about the amendment that has been under discussion here, the original Articles of the Water Company, until in the spring of 1948 when I was out here and was given full [137] inspection of all the company's records at the company's office when I asked for them.

Then I learned first of this amendment referred to at length altering the requisite four shares per acre, under the original Articles, to one share per acre, in substance.

The Court: I think generally we will get along more expeditiously if you will try to keep the answers short.

The Witness: I will, Your Honor.

The Court: Let's have a series of short questions and short answers, rather than trying to cover too much at one time.

The Witness: Very well, Your Honor.

Q. (By Mr. Lucking, Jr.): May I repeat the question: Did you ever talk to Mr. Harmon about the 1935 amendment, Mr. Lucking? A. Yes.

Q. When did you do that first?

A. At the time I was examining the books and records of the company in the spring of 1948.

Q. Where was that?

(Testimony of William Alfred Lucking.)

A. In the company's offices in Ojai, on the main street.

Q. Was this the first conversation you had with Mr. Harmon relative to the 1935 amendment?

A. I had just learned of that at that time, yes, sir, [138] of the amendment, I mean.

Q. Now, would you, with regard to the 1935 amendment, recite to the Court very briefly what your conversation with Mr. Harmon was, please?

Mr. Hollingsworth: That is incompetent, what Mr. Harmon said about it. It wouldn't go to show notice or lack of notice.

Mr. Lucking, Jr.: I will connect it up, Your Honor. His answer is going to be directly to notice. If it doesn't go to notice, I will stipulate it can be stricken.

The Court: All right.

The Witness: Will you read the question, please?

(The question was read.)

The Witness: In the office at that time, after I had spent some hours on the books and records, minutes of meetings and the like, I told Mr. Harmon that I had never known anything about the amendment to the bylaws, changing the requisite number of shares required by the original Articles from four shares to the acre to one share to the acre.

I had never had any notice of it and had no understanding about it of any kind.

He replied to me, if I am permitted to state what his reply was.

(Testimony of William Alfred Lucking.)

The Court: I think the question called for it. Yes, go ahead and tell us. [139]

The Witness: Mr. Harmon replied that no notice was necessary to me for that, to cover that amendment or that meeting of March 4, 1935, which I had just read of in the minutebook.

Mr. Hollingsworth: We move the latter part of the answer be stricken out. There is no authority here of any kind shown, on the part of Mr. Harmon, to bind the corporation or any other instrumentality here concerning the giving or failure to give notice, according to law.

If Mr. Harmon said it, there is nothing to connect here he had any authority to make any such statement, if he made such a statement to Mr. Lucking.

The Court: I think I have in mind the rule that you are urging here. Counsel has said he will connect it up. Unless he does, I will strike it.

Mr. Hollingsworth: Then it may come in subject to a motion to strike?

The Court: Certainly.

Mr. Hollingsworth: All right.

Q. (By Mr. Lucking, Jr.): With regard to that 1935 amendment, Mr. Lucking, was anything else said, do you recall, concerning notice?

A. Not at that time, when I was making this examination I have spoken of.

Q. Were there any later conversations with Mr. Harmon [140] directly relating to the matter of formal notice of the 1935 stockholders' meeting?

(Testimony of William Alfred Lucking.)

A. No other conversation that I recall now on that particular subject of the lack of notice to me and my lack of knowledge of the amendment.

Mr. Lucking, Jr.: I have no further questions. Do you wish to examine?

Mr. Hollingsworth: No, I have no questions. [141]

The Witness: On this issue, Your Honor. I wouldn't like to be excused——

The Court: Yes.

Mr. Lucking, Jr.: With the same reservation, Your Honor, please.

The Court: Yes. [142]

* * *

RAWSON B. HARMON

called as an adverse witness under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

Examination

The Clerk: Your full name, please?

The Witness: Rawson B. Harmon.

Mr. Lucking, Jr.: Now, Your Honor please, I am calling Mr. Harmon under the authority of Rule 43(b) as an adverse witness, as under cross-examination, and the preliminary questions I believe will show it.

The Court: Do you admit, Mr. Hollingsworth——

(Testimony of Rawson B. Harmon.)

Mr. Hollingsworth: He is the managing agent, Your Honor. We have no objection to Mr. Harmon being interrogated under 43(b).

Mr. Lucking, Jr.: Thank you.

Q. (By Mr. Lucking, Jr.): Mr. Harmon, where do you [144] reside, please?

A. Bill, I am a little hard of hearing, you know, and if you will come a little closer.

Q. Yes. Where do you reside, please?

A. Ojai, California.

Q. How long have you lived there, Mr. Harmon?

A. We have lived there since 1930.

Q. You are employed by The Ojai Valley Company? A. I am.

Q. And the Ojai Mutual Water Company?

A. I am employed by the Ojai Mutual Water Company, but I have a contract with The Ojai Valley Company. I am also a minor officer of The Ojai Valley Company.

Q. What is your office with The Ojai Valley Company? A. What is that?

Q. What office do you hold?

A. With The Ojai Valley Company?

Q. Yes.

A. I am assistant secretary and treasurer.

Q. You are assistant treasurer, also; is that correct? A. Yes.

Q. Is your answer "Yes?" A. Yes.

Q. Now, how long have you been assistant secretary, Mr. Harmon? [145]

A. Well, I am not quite sure.

(Testimony of Rawson B. Harmon.)

Mr. Hollingsworth: Of the——

Mr. Lucking, Jr.: Ojai Valley Company.

The Witness: The Ojai Valley Company you are speaking about?

Q. (By Mr. Lucking, Jr.): Yes.

A. I am not quite sure as to when I had the office. I have had my connection with it since 1935, since January, 1935, but I couldn't tell exactly when I was given that office. Sometime after my connection with the company.

Q. January of 1935 was the first time you became connected with The Ojai Valley Company?

A. Definitely, yes.

Q. What did you do in Ojai prior to that time, Mr. Harmon?

A. Well, I didn't spend all of my time there. I had my business in Detroit up until, oh, the end of 1938 or so. Well, up until 1940 I had an office and a business in Detroit, as well as in Ojai.

Q. But it is your testimony, is it, that at about the time, or shortly after you became connected with The Ojai Valley Company you also became a minor officer; is that correct?

A. Well, I would say it was in two or three years, anyway. The minutes would show, I suppose, of their meetings, [146] but I couldn't tell you the exact time.

Q. Now, with regard to the Ojai Mutual Water Company, you are also an officer of that, are you not?

A. Yes.

Q. And what?

(Testimony of Rawson B. Harmon.)

A. I am vice president and assistant secretary.

Q. How long have you held the office of vice president of the Water Company?

A. Well, I couldn't say that exactly either. Now, early in my connection with the Water Company, I would say it would be sometime around 1940, probably, but the minutes might show that. My memory isn't quite as good as it used to be, Bill. I don't carry dates in my mind very well. [147]

Q. Do you recall when you first became employed by Ojai Mutual Water Company?

A. Yes, 1939.

Q. That was your first employment. You are also a director of Ojai Mutual Water Company, are you not?

A. Yes, I am.

Q. When did you first become a director of the Water Company?

A. Well, I think at the time that I—in 1939, when I first became connected with it I was made a director.

Q. You have since 1939, though, been vice president, assistant secretary and director of Ojai Mutual Water Company, is that correct?

A. That is right, yes.

Q. Are you a stockholder of the Mutual Water Company?

A. Yes, I am.

Q. When did you become a stockholder?

A. Quite early, in about 1930, I think. I bought some property there across from Sinclair. I got

(Testimony of Rawson B. Harmon.)

four shares, three or four shares of stock with it then.

Q. Did you later acquire more stock?

A. No, that is all the stock I have.

Q. Now, were you in Ojai during the spring of the year 1935?

A. I think I was. I can't be absolutely sure, because [148] I was going back and forth at that time to Detroit. But I think I was there in the spring of '35.

Q. Do you have an independent recollection of the 1935 stockholders' meeting of the Water Company?

A. No, I had nothing to do with the Water Company at that time.

Q. You were a shareholder, however, were you not, as you testified?

A. Yes, I think just about that time I became a shareholder; very close to that.

Q. Mr. Harmon, you said you became a stockholder in about 1930, when you first purchased, is that correct?

A. I think we bought that property from Kritzel in the early days, and I can't exactly remember when it was, Bill, but it was between '30 and '35.

Q. Actually it was about 1933, was it not?

A. Probably was.

Q. Does that refresh your memory?

A. It is awfully hard for me to keep dates in

(Testimony of Rawson B. Harmon.)

mind. When we came there fairly early we bought that property.

Q. Do you have any independent recollection whatsoever of having received actual written notice of any stockholders' meeting at or about that time?

A. No.

Q. 1933 to 1937, say. [149]

A. No, none whatever.

Q. No recollection at all? A. No.

Q. Yet you were a stockholder in the spring of 1935, is that correct?

A. I am sure I was, yes.

Q. Do you know who suggested the reduction, or, rather, who suggested the 1935 amendment, reduction from four shares per acre to one share per acre?

A. No, I don't think so. I think it was discussed around the office there. From experience with the one share to the acre over the years now—this doesn't include possibly those very early years, but over the years we discovered in operating The Ojai Valley Company and selling lots there it was not necessary to have that four shares to the acre.

Mr. Lucking, Jr.: I move that part be stricken, Your Honor, that is, a necessity of four shares per acre; non-responsive.

The Court: Motion granted.

Q. (By Mr. Lucking, Jr.): But you were around the office, were you, in 1935? A. Yes.

Q. In what capacity?

A. I had a contract with The Ojai Valley Com-

(Testimony of Rawson B. Harmon.)

pany to [150] take over their real estate, to sell the real estate.

Q. Had you started to operate in that capacity?

A. Yes, I had.

Q. That was about January of 1935?

A. It was January of 1935; I think it was. That is the definite date of the contract, as I remember it. It was either '34 or '35, but I think it was '35.

Q. Now, at that time did you have an office in the same building? A. Oh, yes.

Q. There in Ojai? A. Yes.

Q. In other words, in the same building with the Water Company and with The Ojai Valley Company?

A. Yes, that is the same thing together, the offices. They are right together.

Q. Was Mrs. Eldred Jackson at that time an employee? A. She was.

Q. Of what company?

A. Both companies, I think.

Q. Do you know how long she had been an employee?

A. She kept the books. Well, early days—I think she came there first when Mr. Libbey was there, but I have no definite knowledge of my own, except hearsay.

She had been there long before I came there, and I [151] understood she was there when Mr. Libbey was.

Q. From the time you first arrived at or prior

(Testimony of Rawson B. Harmon.)

to January, 1935, were you familiar with the office practice?

A. No, not very—to any extent, no.

Q. From the time you first arrived subsequent to then?

A. The time of my association with them, I was familiar with it then.

Q. Did Mrs. Jackson at that time work for you, also?

A. Yes—well, she did, she was working for the office, and, of course, I was in charge of the office there when I first came in 1935.

Q. You were in charge of the office from at least January of 1935 or before, and from?

A. Yes.

Q. From the material time, subsequently to that?

A. Particularly with my connection in The Ojai Valley real estate then. I didn't have anything to do with the Water Company.

Q. Being in charge of the office, what did you do?

A. Trying to sell real estate mostly.

Q. Was Mrs. Jackson an employee of yours, to some extent?

A. Well, no, she was not my personal employee at all.

Q. You managed her, did you not? [152]

A. Yes, the office there, I did; from the real estate angle only.

Q. Did Mrs. Jackson during this period——

From the time you first became connected there with The Ojai Valley Company and took up office

(Testimony of Rawson B. Harmon.)

spaces there, did Mrs. Jackson act as office manager, so to speak? A. Yes, she did.

Q. Office manager, as employee of Ojai Mutual Water Company?

A. Well, I presume so. I knew it more particularly as The Ojai Valley Company. I was not concerned with the Water Company at all when I first took up my connection with the ——

Q. But she was office manager, in practical effect?

A. She was, yes, when I came in the office.

Q. She has since that time acted continuously in that capacity, has she not?

A. She has and she is a good one, too.

Q. I know it. Has she kept the books and papers and records of the Water Company?

A. Both companies.

Q. And of The Ojai Valley Company?

A. That is right.

Q. She kept custody of the minutes of the meetings of Ojai Mutual Water Company? 153]

A. That I wouldn't know. In those early days, but I assume she did. The secretaries, whoever they were at that time, kept the minutes, I suppose. Whether she wrote them and attended the meetings, I couldn't say.

Q. Was the minutebook kept at the offices there in Ojai?

A. Yes, the Ojai Valley books; the main books are kept in Toledo. We had a set of books out there for the real estate there.

(Testimony of Rawson B. Harmon.)

Q. Including the minutebook?

A. We reported back and forth. I don't think the main Ojai Valley Company books were kept in Ojai.

Q. Were letters and correspondence with the stockholders of the Water Company carried on by the Ojai office?

A. Well, I assume they were. As I say, I don't have—when are you speaking of?

Q. During 1935.

A. No, I don't know about that definitely, because I had really no connection with the Water Company in my early days there. Mr. Clark was the manager of the Water Company when I first came there.

Q. Are you familiar with any change in practice between what was done then and what is done now? Are you aware of any change?

A. I assume I have some knowledge of it. [154]

Q. Did Mrs. Jackson send out the bills for water dues during 1935?

A. She did, yes, I would say she did.

Q. Did she send out delinquent notices from the Ojai Valley office?

A. She had charge of sending out the bills.

Mr. Lucking, Jr.: I have no further questions.

Mr. Hollingsworth: No questions.

Mr. Lucking, Jr.: Again, our request of leave to recall Mr. Harmon if necessary. [155]

RAWSON B. HARMON

recalled as a witness, having been previously duly sworn, testified further as follows:

Examination

The Witness: Do I have to be sworn again?

Q. (By Mr. Lucking, Jr.): No. Mr. Harmon, have you, as a stockholder of the Water Company, ever received written notice of any annual stockholders meeting of the Water Company since you became a stockholder in 1933, or thereabouts?

Mr. Hollingsworth: That is objected to as immaterial. The by-laws speak for themselves.

The Court: Overruled.

Q. (By Mr. Lucking, Jr.): Would you like to have the question repeated, Mr. Harmon?

A. What is that?

Q. Would you like to have the question repeated, please?

A. No. Does the judge—do I have to answer it?

Q. Yes, you may answer it.

The Court: Answer it. If you have a recollection on that subject, tell us.

The Witness: I don't think I have had any notices of annual meetings. We don't send them out, generally speaking.

Q. (By Mr. Lucking, Jr.): You have no recollection of any—I will rephrase that.

A. The annual meetings, no. It is my understanding [167] that, under our setup there, that no notice is required to be sent out of the annual meeting of the stockholders.

(Testimony of Rawson B. Harmon.)

Q. And it is your understanding, though, that you have never received a notice of an annual meeting?

A. Well, I wouldn't receive it anyway, because we would be the one to send it out there in the office.

Q. You are a stockholder, Mr. Harmon?

A. Yes, I am a stockholder, that is true.

Q. And you have been since 1933, when you bought the Twitchell property?

A. Well, I would know about the annual meetings, because we send out the call.

Q. Do you know of any notice having been sent out of any annual meeting of stockholders to the stockholders generally?

A. Not during my time there.

Mr. Lucking, Jr.: I have no further questions.

Mr. Hollingsworth: No questions. [168]

* * *

MRS. ELDRED JACKSON

recalled as a witness by the plaintiff, being previously duly sworn, was examined and testified further as follows:

Examination

By Mr. Lucking, Jr.:

Q. Mrs. Jackson, as an employee of the defendant company from 1934 on, and during your tenure in office there, did you ever see any notices to stockholders of stockholders' meetings or of any stock-

(Testimony of Mrs. Eldred Jackson.)

holders' meeting being typed up or mimeographed or sent out of that office?

Mr. Hollingsworth: That is objected to as immaterial, Your Honor, unless it is directed to this amendment. Subsequent to 1935 would be incompetent, irrelevant and immaterial.

Mr. Lucking, Jr.: I think it goes to the weight, Your Honor.

The Court: Suppose he establishes a custom to never send out notices?

Mr. Hollingsworth: It shows, Your Honor, she came in there after the 1935 amendment. What she did or what occurred after she came in would not be material in establishing any custom prior to that time or at that time.

The Court: Sustained. [169]

Q. (By Mr. Lucking, Jr.): Mrs. Jackson, in 1935, while you were working in the company office up there, did you see any notices being sent out to stockholders of the Water Company, noticing an annual stockholders' meeting?

Mr. Hollingsworth: Just a moment, please. If that is directed, if that is directed to notices she sent out—is that what you are directing it to?

Mr. Lucking, Jr.: No.

Mr. Hollingsworth: Whether she saw any notices in the office?

Mr. Lucking, Jr.: That is correct, Your Honor.

Mr. Hollingsworth: I say it is incompetent, what she might have seen in the office.

The Court: Sustained.

(Testimony of Mrs. Eldred Jackson.)

Q. (By Mr. Lucking, Jr.): In your employment by the Ojai Volley Company in 1935, Mrs. Jackson, did you receive the Ojai Valley Company mail?

Mr. Hollingsworth: What was that last part of the question? You don't speak quite loud enough.

Mr. Lucking, Jr.: Will you read the question?

(The question was read.)

Mr. Hollingsworth: I presume that is a preliminary question. I won't object to that.

The Witness: I did not.

Q. (By Mr. Lucking, Jr.): Who did, please?

A. Mr. Burns was working at the office at that time. My work was almost entirely at the Ojai Valley Country Club during the season it was open; during the time it was open, I should say.

Q. In other words, you spent most of your time up at the club and not at the downtown office?

A. Until the club closed in May. [171]

* * *

Mr. Lucking, Jr.: If Your Honor please, I submit the by-laws as Plaintiff's 3 for Identification, reserving leave to question them as to their regularity and so on, since we are not familiar with this set.

Mr. Hollingsworth: Aren't those the by-laws of the [173] Water Company?

Mr. Lucking, Jr.: That is correct.

Mr. Hollingsworth: Yes, that is right.

Mr. Lucking, Jr.: I am just looking for—

Mr. Hollingsworth: Section 7.

Mr. Lucking, Jr.: Article II, Section 7. I would like to read into the record——

Mr. Hollingsworth: Why don't you just offer it in evidence and have the Court reporter put it in?

Mr. Lucking, Jr.: I offer Article II, Section 7, of the by-laws in evidence. The title of Section 7, "Notice of Regular Meeting. No notice shall be required to be given of any regular meeting of the board of directors, but each director shall take notice thereof."

Excuse me. It should be of the stockholders.

I beg your pardon, Your Honor. I wish to correct that. It is Article I, entitled, "Meeting of Stockholders." Section 3. "Notice of Regular Meetings. No notice whatever shall be given of the regular annual stockholders' meeting, but each stockholder shall take notice thereof."

The Court: You offer that into evidence——

Mr. Lucking, Jr.: I offer that as Plaintiff's 3.

The Court: ——by the process of reading it into the record?

Mr. Lucking, Jr.: That is correct. [174]

* * *

The Court: All right. We will hear Dr. Butler tomorrow. I wondered, Mr. Hollingsworth, how you are going to sustain your position if the Court should find that notice was not given.

Mr. Hollingsworth: That notice was not given?

The Court: Yes. If these witnesses should lead me to that conclusion, then what of it?

Mr. Hollingsworth: I don't think, Your Honor, under the cited cases, that there was any evidence here to show that [175] notice was not given. The only thing is that somebody didn't receive a notice of the meeting of the stockholders, at which the amendment of March 4, 1935, occurred.

Now, that standing alone is not evidence of the fact that no notice was sent out. We have to rely upon the presumption for the reasons that I have heretofore stated to the Court.

The presumption is definite, clear, plain. Section 362(b) of the Code, to the effect that the certificate of the Secretary of State is evidence of the fact—I am referring now to the 1933 Code—I have already stated the Legislature did not adjourn in 1935 until some time, I think it was the 17th of June; under constitutional provision the effective date of the amendment would not take place within the 90-day period—I mean would take place prior to the expiration of the 90-day period and consequently Section 362(b) of the 1933 Code applies.

Now, under the title of the section of the '33 Code, you go over to Section 362 of the same Code and it provides how an amendment to the Articles of Incorporation may be had.

The heading to Section 362 of the 1933 Code says, "By complying with the following provisions a corporation may amend its articles for any or all of the following purposes:"

Then it sets out specifically the manner in which the [176] amendment may be made. Then you go over to 362(b), and you find under the filing of the

certificate, that the certificate shall be submitted to the Secretary of State, "who shall file the same and put an endorsement of filing thereon, if he finds that it shows a compliance with the provisions of this section," which is Section 362(b), which provides how the amendment, the mechanics necessary to bring about the amendment.

The Court: Including the notice?

Mr. Hollingsworth: Yes. Then it says, "If he finds that it shows a compliance with the provisions of this section, thereupon the articles of incorporation shall be deemed amended in accordance with such certificate and a copy of such amendment and the certificate thereto certified by the Secretary of State shall be evidence of the performance of the conditions necessary to the adoption thereof:" [177]

Now, we have to rely on it. Nobody else connected with the Valley Company, nobody connected with the Mutual Water Company, nobody—no stockholders in attendance at any of the meetings has come forward and stated that at that time the necessary requisite for the adoption of the amendment had not been complied with, and that no notice had been sent out. And there are cases holding, Your Honor, that the question of laches and the question of estoppel may arise.

We feel that it is a perfect case, and if Your Honor asked me the question on the specific point: How are we going to show that notice was sent out, in view of the testimony that has been received by the Court, my answer would be that it is not necessary.

The Court: I had intended to ask you: Suppose the Court, after analyzing the evidence on this subject, and in weighing against the presumption—the presumption being evidence, too—finds that there is a conflict between the evidence which Mr. Lucking is producing and the presumption upon which you rely, and resolves that conflict in favor of the plaintiff, where does that leave you?

Mr. Hollingsworth: My answer is a very plain one, Your Honor. Negative proof alone is not sufficient to overcome an affirmative presumption created by statute. All the proof is negative.

The Court: Yes. I recognize that that is a principle [178] to be considered in resolving the burden, or in resolving the conflict——

Mr. Hollingsworth: It is purely negative.

The Court: ——or in resolving the evidence.

Mr. Hollingsworth: Actually, there is no conflict on negative testimony. There would have to be some affirmative testimony.

The Court: Suppose it does come in?

Mr. Hollingsworth: If it does, then that is another question. Then Your Honor would have to resolve the conflict.

The Court: Then where does that leave the lawsuit? Supposing that would be resolved against you—I would like to be educated here a little bit as to your views on it, so that we will be able to know your position.

Mr. Hollingsworth: I don't think it has any effect on the lawsuit at all. The fact of the amendment, cutting to one share per acre, that is, cut-

ting down the allotment of stock to one share per acre, would not make it obligatory upon the corporation to issue more shares of stock in order to furnish to present users four shares per acre. I don't think that is the practical solution at all. I don't think it creates any cause of action on the part of any stockholder to demand or receive additional shares of stock, where the corporation for over a period of 20 years has been operating on one share per acre basis. [179]

That is my present opinion, and we have never tried to put any amendment through that would affirmatively show notice, because we are satisfied with the statutory presumption that we did what we were required to do according to law, and there is yet no testimony to show that we have done anything, or failed to do anything which the law required that we should or should not do.

I am satisfied of that under the cases, that it does not change the picture at all. If somebody should buy an acre of land out there now, we will say tomorrow, and come to us and tell us they wanted four shares of stock per acre, under the articles of incorporation we are not required, and there is no mandate on the part of the Water Company to furnish a purchaser of land with a share or shares of stock. The articles of incorporation specifically take care of that.

It was organized on that basis, and for that particular purpose. It is not a mandatory thing.

Your Honor asked a question the other day about what is a mutual water company. I searched through

the Code trying to find the definition of a mutual water company, and I couldn't find one, but I think a mutual water company in common everyday accepted practice is one where water can be distributed only to qualified stockholders within a restricted area without profit. It has to be on a non-profit basis, because, Your Honor, under the case of Mound Water Co. [180] v. Southern California Edison Company, and other cases, it was held many years ago that a mutual water company is not a public utility, cannot be so classified, and cannot be subjected to the burden of a public utility system.

We are not a public utility. We do not have to furnish water. If we have a supply of water, it is a privilege on our part to furnish it, but we must do it on a non-profit basis. Now, that is the way we have operated.

We don't think, even assuming the amendment back in 1935 was not formally adopted in the manner Mr. Lucking says it should have been done, that it affects the legal rights of Mr. Lucking or any other shareholder or stockholder of the company, because after a lapse of 20 years there are certainly no rights on the part of past stockholders to come in and question the validity of that amendment at this late date, which is precisely what Mr. Lucking is doing, and the cases hold that he was bound with notice of the articles and bylaws, and the amendments thereto, when his first share of stock was issued to him, and for him to get on the stand and say he didn't know anything about it until he ex-

amined the articles of incorporation, or books, or minutes, whatever he may have looked at in the office, doesn't strengthen his position before this Court one bit, any more than his argument to the effect that we can only furnish water to Libbey land-owners, or any more to the effect that we can't take water to [181] somebody else, or deliver it to somebody else within the service area, or any more than the argument to the effect that our stock is appurtenant to the land, when the articles of incorporation absolutely negative it, and that it was set up for the express purpose of not becoming the purpose.

Those are all questions of law, Your Honor, that can be decided on briefs, or on further argument, if Your Honor wants it.

I don't know if the time of this Court should be taken up here for days on end to determine something that is already before Your Honor as a matter of law. It is purely a question of law.

The Court: That is the way it appears to the Court, except for this one matter which we have left open for evidence, that this case can be determined probably better on argument and briefs than by witnesses who will merely state legal conclusions.

* * *

Mr. Hollingsworth: I will read that portion of the Articles of Incorporation to you, also, which is reaffirmed in the amendment at the bottom of them.

First of all, the bylaws, Your Honor, referring to [185] Defendants' Exhibit B, describe the metes

and bounds description of land; Ventura County, containing 2,765 acres.

“Provided that any stock holder desiring to use and using said water shall be the owner of one share of the capital stock——”

This is the original Article——

“——one share of the capital stock of the company for each one-quarter acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the bylaws of the company may determine.”

This is it:

“Mere ownership of stock in said company or of land situated within the above described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible.”

Now, going over on the issue of the appurtenant stock of the Mutual Water Company, before the stock could become appurtenant there has to be a bylaw adopted to that effect and recorded in the Office of the County Recorder. [186]

Mr. Lucking, Jr.: By what authority, counsel? Excuse me.

Mr. Hollingsworth: I will read it in just a moment. I am reading now from *Palo Verde Land & Water Co. v. Edwards*, 82 Cal. App., at page 52.

The question arose in that case of a mutual water

company, whether or not the stock was appurtenant or nonappurtenant. The court held:

“Section 324 of the Civil Code predicates the attributes of personal property to shares of stock in a water company and that such shares remain personal property unless the corporation shall adopt and record in the Office of the County Recorder a by-law that the stock shall be appurtenant to the land. It would seem, therefore, that unless such a by-law be adopted the stock must remain personal property and not become appurtenant to the land.” Citing a long list of cases here. And I am going over on page 59 of the opinion relative as to whether or not the stock was appurtenant or nonappurtenant. In that case it had been mortgaged and the question is whether the stock went with the land on a foreclosure of the mortgage or a pledge of the personal property. The court expressly held it was a pledge of personal property. On page 59 of the opinion: [187]

“There are no such provisions in the Articles of Incorporation or by-laws in the instant case. The only provisions to be considered here are in effect: That water shall be distributed only to lands upon which stock has been located; that stock shall be located only upon lands owned or claimed by the purchaser, and that the certificate shall contain a description of the land on which the shares are located.

“There is certainly nothing in any of these provisions which would prevent the transfer of the water stock to other lands or which would give to

the words 'location' or 'located' the meaning of 'appurtenant' or which would give to the shares of stock the fixed character of real property, contrary to the general provision of the law defining the character of shares of stock of a corporation as personal property."

On page 61 of the opinion:

"Section 324 of the Civil Code, as amended in 1895, was in force at the time of the incorporation of the respondent company, it being incorporated in 1908, and it would seem that if it were the intention of the incorporators that the stock should be appurtenant to the land they would have so provided [188] in their by-laws and complied with the section relative to recording and thus made the stock appurtenant to the land, which the trial court found not to be appurtenant, and which we think is the correct view."

Going down to later cases, the *Bank of Visalia v. Smith*, 146 Cal. 398, the owner of land, also owned five shares of stock of a mutual water company. He mortgaged his land to the bank. The bank foreclosed the mortgage, also claiming that the five shares of stock in the mutual water company went with the land, they not having been included in the description of the mortgaged property, despite the fact that the mortgage contained the provision:

"* * * with all the water rights and privileges appurtenant to said ditch, or by means of which said ditch is supplied with water * * *"

The Supreme Court, in passing upon the question as to whether or not the stock was or was not ap-

purtenant, used the following language, quoting from page 400, 401 of the opinion:

“This description does not, however, mention the shares of stock nor do its terms give rise to any presumption that they are appurtenant to the Curtis Ditch, or that they represent any water-right or privilege ‘by means of which said [189] ditch is supplied with water.’ ”

Then the court held:

“ ‘A thing is deemed to be appurtenant to land when it is by right used with the land for its benefit.’ (Civil Code Section 662). Whether such appurtenance exists is a question of fact, to be determined upon extrinsic evidence, and the burden of establishing such fact is upon he who claims a right to the appurtenance. Shares of stock, as such, are not presumptively appurtenant to land, and if the plaintiff would claim that the shares of stock in question represent water-rights or privileges which are appurtenant to the Curtis Ditch, or by means of which the ditch is supplied with water, it was incumbent upon it to introduce evidence of such fact.” [190]

We do not need such evidence in this case, your Honor, because the articles of incorporation have been pleadings set forth by the plaintiff in his complaint, expressly showing on its face that the stock is not appurtenant. He doesn’t claim that his own stock is appurtenant. He just got shares of stock, his personal property.

That is the answer to Mr. Lucking’s question as to whether or not—how are you going to make it

appurtenant? There would have to be an adoption in the by-laws to that effect.

I might call the court's attention to the certificate of the amendment to the by-laws offered in evidence as Defendant's Exhibit A, which again reiterates the fact that the mere ownership of stock in the corporation, provides that any stockholder desiring to use, and so on, that "mere ownership of stock in said company or of land situated within the above-described limits shall not entitle the stockholder to any water whatever, unless he and his land shall be otherwise eligible."

Mr. Lucking, Jr.: If that expressly states it is non-appurtenant, that is pretty good language. If, as a matter of law, the court were to determine in a given case it was, that that meant it was not appurtenant that would be one thing. It certainly is a matter of law, whether that language means it is non-appurtenant. I can't read any [191] expressed thing on it.

The Court: You contend the case before the court, in this case it is appurtenant?

Mr. Lucking, Jr.: We do, your Honor, contend that these defendants, by their affirmative acts, have made that stock appurtenant to the land of the users, the present users of water.

We will show and, incidentally, we have already filed with the court, pursuant to pretrial order, photostats of certificates of stock issued by these defendants, by the defendant Ojai Mutual Water Company, while under the complete domination and control of The Ojai Valley Company, which right,

on the face of those certificates, state these certificates, or these shares are appurtenant to Lot so-and-so, Block so-and-so, and naming the tract.

Now, I am familiar with the code section to which he refers, your Honor. The word "may" is used in that code section and it does not mean that is the only way to do it. The case of *Smith v. Hallwood Irrigation Company*, that we previously cited to the court, states very clearly whether or not stock is appurtenant is a question of fact.

It holds that the acts of the user and of the water company and the manner in which the water is furnished and used, as well as evidence of contract, all are admissible, to show whether or not as between the stockholders of the shares are [192] appurtenant.

Counsel cites the *Palo Verde Land & Water Co. v. Edwards*, and you will note there are two very great distinctions between what counsel sees in that case and our case.

In the first place, there was a bona fide purchase of a pledgee involved in that case. Here we are not trying to hold that these few users around the perimeter of these Libbey lands are not entitled to water. They bought their land on good faith and their shares on good fath, and we haven't raised the question in this proceeding as to whether or not they are entitled to water. They already own stock and already bought——

The Court: You raised the issue here in this proceeding as to who is entitled to water at all?

Mr. Lucking, Jr.: I think we have, your Honor, very clearly.

Mr. Hollingsworth: We never denied water to Mr. Lucking or anybody he claimed to represent.

Mr. Lucking, Jr.: That has nothing to do with it, counsel.

Mr. Hollingsworth: That we can't agree [193] with.

* * *

The Court: The Secretary of State used to be very careful—as I learned when I was practicing law and was representing corporations—and if your recitations were not complete or even if they were ambiguous, back came your articles and your amendments, with an explanation of why they cannot be filed.

I think the acceptance by the Secretary and the filing does give rise to a presumption that they were proper and in proper form and order.

What bothers me is whether this Section 362 of the [198] Civil Code is modified by Section 312 to the extent that the notice—well, I am troubled in formulating my thoughts. I think we had better adjourn and take it up tomorrow. [199]

* * *

Wednesday, June 1, 1955. 10:10 A.M.

The Court: Now, counsel, in this case on trial, we will finish taking the evidence on this immediate point, that we started on yesterday, and after taking the evidence on that I will give you a brief recess, and then we will argue it out, that particular

point, and hear any other motions which either of you feel inclined to make, as that particular phase of the case is concluded.

Mr. Hollingsworth: Do I understand, your Honor, you want, after the issue of the validity of the amendment has been presented to the court, you want that argued out?

The Court: I would like that argued out and then I will hear any motions that either side wishes to make, so that we may proceed to the next, whatever next phase of the case appears to be the proper one to go to.

Mr. Hollingsworth: I see.

Mr. Lucking, Jr.: If your Honor please, is the matter to be argument then after this last witness on this point, to be confined to the question of whether or not the statutory notice was given and required, or does the court desire us also to go into the matter of whether it makes any difference whether notice was given?

The Court: Yes.

Mr. Lucking, Jr.: The whole phase of the 1935 amendment? [203]

The Court: I would like you to go into that whole phase of the case, so that whatever problems there are in that particular phase of the case will be dealt with while we have it hot here and the testimony fresh in memory. [204]

DR. CHARLES T. BUTLER

called as a witness by and on behalf of the plaintiff, having been first duly was examined and testified as follows:

Direct Examination

By Mr. Lucking, Jr.:

Q. Your full name is Charles T. Butler; is that correct? A. That is correct.

Q. You are a physician, are you not?

A. Yes, sir.

Q. Where do you reside?

A. 1116 Foothills Road, Ojai.

Q. California? A. California.

Q. Now, how long have you lived in Ojai?

A. Approximately 25 years.

Q. Are you a stockholder of the Ojai Mutual Water Company? A. I am.

Q. When did you first become a stockholder of the Ojai Mutual Water Company, Dr. Butler?

A. April 1930. May I refer to a memorandum?

Q. Well, that year now is close enough. It is 1930 you first became a stockholder?

A. I believe so. [205]

Q. Now, have you been a stockholder continuously since that time? A. I have.

Q. Now, in 1930 is it a fact that you purchased real estate there in Ojai? A. I did.

Q. And you received at that time how many shares of stock, of water stock?

A. Ten shares of stock.

Q. Those particular 10 shares of stock you held

(Testimony of Dr. Charles T. Butler.)

for approximately how long, Doctor? Until what year? A. Until 1947, I believe.

Q. Prior to the time that you sold those shares, you purchased a different piece of property and obtained more shares; is that correct?

A. That is correct.

Q. Now, Doctor, during your time as a stockholder of the Ojai Mutual Water Company, have you ever received any written notice of a stockholders meeting of the Water Company?

A. To the best of my knowledge and belief, I never have.

Q. Did you ever receive any notice of any sort of the annual meeting of the stockholders of Ojai Mutual Water Company to be held in March, of 1935? [206] A. No.

Q. Doctor, did you, at my request, refresh your memory from certain records of yours with regard to this? A. I did.

Q. Would you describe to the court the nature of the records to which you refer?

Mr. Hollingsworth: That is not necessary. I object to that. He has already testified, your Honor, and there is no need to refresh his recollection. That is quite obvious. The matter has been testified to. Now, if we go back over any documents that he may have in his possession, from which he refreshed his memory, I submit that is immaterial at this time. His testimony is in the record.

Mr. Lucking, Jr.: Your Honor, I think it goes

(Testimony of Dr. Charles T. Butler.)

clearly to the weight, to show why Doctor Butler can testify as he has.

Mr. Hollingsworth: It does not go to anything. The man has testified under oath here that, to the best of his recollection, he never received any. There is no necessity now for refreshing his recollection.

The Court: I take it, this is not strictly present memory refreshed evidence. It might be that kind of evidence, but he is not strictly undertaking to refresh the memory of the witness now, but is undertaking to show the circumstances under which a court would give credence to the [207] fact that the memory has been refreshed concerning a matter which might not ordinarily be one that a person would retain in memory for so long a period of time, and would have to have some memory refreshment.

Is that what you are driving at?

Mr. Lucking, Jr.: That is the idea, your Honor. This happened 20 years ago, or thereabouts.

The Court: And to see how it is he has a memory of the subject that has been referred to. As you say, it is a long time ago, and I think it is proper for counsel to briefly go into it; not at great length.

Mr. Lucking, Jr.: All right, your Honor. We will try to make it very fast. [208]

Q. (By Mr. Lucking, Jr.): Doctor, you brought certain memory refreshers with you, did you not, at my request? A. I did.

Q. Will you bring those out?

(Testimony of Dr. Charles T. Butler.)

Mr. Lucking, Jr.: Your Honor please, we are not offering these in evidence, we are merely——

Mr. Hollingsworth: May I see them, please?

Mr. Lucking, Jr.: Certainly. It is to show the basis upon which Dr. Butler has refreshed his memory on the matter.

Q. By Mr. Lucking, Jr.: Doctor, would you describe what those items appearing as notebooks, appearing to be notebooks are?

A. They consist of weekly reminder pads for each year since 1930 to date.

Q. You didn't bring all of them from 1930 to date, did you, Doctor, with you? A. No.

Q. What years did you bring with you, please?

A. I have here from 1932 to 1936.

Q. Inclusive, is that correct?

A. Inclusive.

Q. Doctor, did you keep these reminder pads in your own handwriting? A. I did.

Q. Did you keep them from day to day, as the items in [209] them indicate? You wrote in those pads as the questions or the matters contained therein came up, is that correct? A. I did.

Q. At the time they came up, is that correct?

A. That is correct.

Q. Now, do these reminder pads also contain notations and so on, showing what you did on the particular day, to some extent? A. They do.

Mr. Lucking, Jr.: Would counsel care to examine any of them?

Mr. Hollingsworth: No. If you say his pads

(Testimony of Dr. Charles T. Butler.)

don't show any receipted stock, it is all right with me. I am not questioning it.

Q. (By Mr. Lucking, Jr.): Doctor, was it your habit in keeping these pads to put down matters such as a stockholders' meeting or other meetings when you received notice of those?

A. Most definitely.

The Court: Would that be true even if it were a meeting you did not intend to go to?

The Witness: Yes.

The Court: What was your object in keeping a record of meetings scheduled, but which were not intended to be visited by you?

The Witness: Well, your Honor, I was leading a very [210] active community life at that time, and associated with many organizations, with board meetings and committee meetings, as well as social engagements. And everything that came before me in the nature of an invitation or a due meeting went down on these pads.

I checked them with a check, when I attended them. I either put a zero or left them blank when I didn't. It is a very complete record of my activities and scheduled activities.

The Court: Did you hold shares in any other corporation at that time?

The Witness: Oh, yes.

The Court: Do your records show receipt of notice of annual meetings of any of those?

The Witness: They do not. All my common stockholdings were in the name of my broker in

(Testimony of Dr. Charles T. Butler.)

New York, who collected the dividends and I didn't bother with them.

The Court: All right. Mr. Hollingsworth?

Mr. Hollingsworth: Is that the only stock you owned, the holdings in the common stock in your broker's name?

The Witness: Will you repeat that question?

(The question was read.)

Mr. Hollingsworth: Is it your recollection that you owned no other stock of any kind or nature, other than the Ojai Mutual Water Company stock that stood in your name in the year 1935? [211]

The Witness: I would think that would be the case, inasmuch as—may I enlarge on that answer?

Mr. Hollingsworth: Well, I am just asking you if you held other stock in your name, any other stock of any kind.

The Witness: Probably some other stocks my broker had in safekeeping may have been in my name, because I believe I did receive some annual reports from New York corporations.

Mr. Hollingsworth: Did you note it in your 1935 diary or whatever it is?

The Witness: Not in connection with those, no.

Mr. Hollingsworth: That is all.

Q. (By Mr. Lucking, Jr.): Dr. Butler, do you have an item in your book in 1933 with regard to a meeting of the shareholders of Ojai Mutual Water Company? A. I do.

Mr. Hollingsworth: That is objected to as in-

(Testimony of Dr. Charles T. Butler.)

competent. That is prior to the amendment, your Honor, two years prior.

Mr. Lucking, Jr.: Counsel, this goes to the weight to be attached to these things.

The Court: He answered very quickly to that one.

Mr. Hollingsworth: I move to strike the answer as incompetent.

Mr. Lucking, Jr.: It goes to the weight, your Honor, showing that he offered to show by this that he received a telephone call to come down——[212]

The Court: We are not going further into that particular one. But the motion to strike is denied.

Mr. Lucking, Jr.: As I understand your Honor's ruling, you don't want to go in further to the 1933 entry with regard to this Water Company meeting?

The Court: What is your point?

Mr. Lucking, Jr.: It is merely to fortify our contention these are an active and actual and valuable reminder of this type of thing.

The Court: You can show that particular attention was given to the Water Company's stock, if that is the purpose of your inquiry, and hence there would likely be an entry if there had been a notice. You may show that.

Mr. Lucking, Jr.: That is what I would like to do, your Honor.

The Court: All right.

Mr. Lucking, Jr.: Subject to a motion to strike if it is not proper.

(Testimony of Dr. Charles T. Butler.)

Q. (By Mr. Lucking, Jr.): Did you, Doctor, in 1933 receive a communication——

The Court: He said he had.

Mr. Lucking, Jr.: Yes.

Q. (By Mr. Lucking, Jr.): Will you refer to your 1933 notes and explain to the court what the notes say and what happened at that time? [213]

A. Under the date of March 6, 1933, I have a notation that the Ojai Mutual Water Company—Ojai Mutual Water Company annual meeting at 3:00 p. m.

Q. Would you state the circumstances under which that was written, Doctor?

A. My memory of the circumstances is that I was called up from the office of the Ojai Mutual Water Company and asked to attend a meeting, inasmuch as they didn't have a quorum.

Q. Did you attend?

A. I did attend that meeting.

Q. Now, Doctor, did you at my request examine your books for the years 1934 and '35, with particular reference to any notice of this 1935 stockholders' meeting of the Water Company?

A. I did.

Q. Did you find any notation indicating any notice had been received by you of any sort?

A. None whatever. [214]

* * *

Q. (By Mr. Lucking, Jr.): Doctor, when you purchased your property and obtained the 10 shares

(Testimony of Dr. Charles T. Butler.)

of water company stock with it, how many acres of land was in that parcel?

A. You refer to the first purchase?

Q. That is the question.

A. Ten acres.

Q. And for those 10 acres with a home, you received 10 shares of stock; is that it?

A. That is correct. [217]

* * *

Cross-Examination

By Mr. Hollingsworth:

Q. Just one question, Doctor. This land that you [221] purchased, and to which you were furnished water by the Ojai Mutual, that was not purchased from the Libbeys, was it?

A. No.

Q. That was non-Libbey land, so-called?

A. Which purchase are you referring to?

Q. I am referring to the purchase that you referred to.

A. Well, I bought two places in Ojai.

Q. I am referring to the one you testified to.

A. With the 10 shares?

Q. Yes. That was not purchased from Libbey?

A. No.

Q. Or any of the so-called Libbey land?

A. Oh, it was within the Libbey land, yes.

Q. But you did not derive title from Libbey?

A. No.

(Testimony of Dr. Charles T. Butler.)

Q. You bought from somebody other than Libbey? A. That is right.

Q. And you got water? A. Yes.

Mr. Lucking, Jr.: Your Honor please, I think this is outside the scope of the direct examination, and I object to it, and move it be stricken.

The Court: I am trying to avoid having to bring the doctor back, and having both sides here, I will rule upon admissibility at a later time. [222]

Mr. Lucking, Jr.: Then is it understood, your Honor, we have reserved our objections?

The Court: Yes.

Mr. Hollingsworth: Certainly, that is understood.

The Court: State them here now. They are just stated for guidance of counsel, so they may reframe the question.

Q. (By Mr. Hollingsworth): You got water from the Ojai Mutual? A. I did.

Q. On land that you did not purchase from the Valley Company or from Libbey or Mrs. Libbey?

A. Yes.

Q. Are you getting—you are not a customer now, are you? A. No.

Q. You own stock? A. That is right.

Q. You are not billed for any water?

A. Not from——

Q. By the Ojai Mutual? A. No.

Q. You are not getting water from them?

A. Except indirectly.

Mr. Lucking, Jr.: Your Honor please, may I

(Testimony of Dr. Charles T. Butler.)

interpose an objection again? I want to reiterate my objection, that this [223] is beyond the scope clearly.

Mr. Hollingsworth: Naturally.

Mr. Lucking, Jr.: Counsel, wait a minute, please.

Mr. Hollingsworth: That is understood.

Mr. Lucking, Jr.: Clearly beyond the scope of the direct examination, and that if the Court finds this is beyond the scope of the direct examination, that to that extent, to the extent it is beyond the scope of the direct examination——

The Court: Make him his own witness.

Mr. Lucking, Jr.: That the doctor is defendants' witness.

The Court: Surely. [224]

* * *

RAWSON B. HARMON

recalled as a witness on behalf of the defendants, having been previously duly sworn, was examined and testified further as follows: [227]

* * *

Direct Examination

By Mr. Hollingsworth:

Q. Mr. Harmon, you were here in court yesterday when Mr. Lucking testified relative to a conversation that he stated that he had with you at the Ojai Mutual Water Company offices in Ojai, when

(Testimony of Rawson B. Harmon.)

he testified, in substance, that you stated to him that no notice was necessary to give to him, in order to amend the Articles of Incorporation.

Did you hear that testimony?

A. I did, yes.

Q. What is your recollection of the conversation? Will you state it, please?

A. It is a long time ago. What was the date of that conversation? Can I ask that to be given?

Mr. Lucking, Sr.: It was the spring of 1948.

Q. (By Mr. Hollingsworth): Spring of 1948.

A. Yes. It is a long time ago. Mr. Lucking came in and wanted to see the things in the office there that we had. And we practically gave him carte blanche to look over everything he wanted to look over.

Q. Speak up just a little louder.

A. To look over anything that he wanted to look over in the books of the company, and we had some conversation. I can't absolutely recall exactly what was said at the time. But I was under the impression that he was asking about the [228] annual meetings, and, of course, I think that what I said at that time was that under our bylaws there was no obligation whatever to give notice to the stockholders of the annual meeting.

Q. Is that your recollection of what you stated to him?

A. That is the recollection I have of that time, yes.

(Testimony of Rawson B. Harmon.)

Q. Did you state anything to him about amendment of the bylaws?

A. I do not recall anything.

Q. Or the Articles of Incorporation?

A. I do not recall anything of that nature, no.

Mr. Hollingsworth: That is all.

Cross-Examination

By Mr. Lucking, Jr.:

Q. Mr. Harmon, just to try to refresh your memory of 1948——

The Court: I think he is going to have difficulty hearing you.

Mr. Lucking, Jr.: I am sorry.

The Witness: You had better come up a little closer.

Q. (By Mr. Lucking, Jr.): Mr. Harmon, just to try to refresh your memory with regard to this 1948 meeting with Mr. Lucking, didn't he at that time tell you that he had never before seen this 1935 amendment?

Mr. Hollingsworth: That is immaterial, whether he had [229] seen them or not. I object to it as improper cross-examination.

The Court: Sustained.

Mr. Lucking, Jr.: This——

The Court: What is the materiality?

Mr. Lucking, Jr.: To try to refresh Mr. Harmon's memory, your Honor, and it was Mr. Lucking's testimony, as I recall——

(Testimony of Rawson B. Harmon.)

The Court: For that purpose it is allowed.

Q. (By Mr. Lucking, Jr.): Do you recall the question now, Mr. Harmon?

A. No. Say it again.

(The question was read.)

The Witness: I couldn't remember that. It is my impression we simply discussed he had not received notices of the annual meetings, and I told him that under our bylaws it was not necessary to—my understanding was it was not necessary to notify stockholders of the annual meetings.

Q. (By Mr. Lucking, Jr.): Did Mr. Lucking at that time refer to the 1935 amendment, changing the shares from four per acre to one per acre?

A. I don't remember.

Q. You have no recollection of that?

A. I have no recollection of the change of the stock.

Mr. Lucking, Jr.: I have no further questions.

Mr. Hollingsworth: That is all. [230]

* * *

Mr. Hollingsworth: May it please the court, counsel: Addressing myself to your Honor on the issue now before the court, respecting the validity of the March 4, 1935, amendment to the articles of incorporation of the Ojai Mutual Water Company, I first desire to call the court's attention to the fact that it is pleaded in Mr. Lucking's complaint that his first purchase of land in the service

area occurred on the 11th of January, 1928. That first purchase, I should say, consisted of 15.98 acres, almost 16 acres. His second [232] purchase occurred——

Mr. Lucking, Jr.: Excuse me, counsel. What paragraph is that, so that I can follow you?

Mr. Hollingsworth: I am reading from the brief here, but it is in your pleadings. I think it is the seventh or eighth paragraph.

Mr. Lucking, Jr.: I am sorry. I have got it. Thank you.

Mr. Hollingsworth: He purchased on September 26, 1930, an additional 33.32 acres.

Again he entered into a contract for the purchase of land on the 21st of May, 1945, and that was the third transaction, for 20.82 acres of land.

As to the water shares, it is alleged and set forth, and I don't think it is disputed, that he received on the last transaction one share per acre.

Now, to determine whether or not the amendment was valid, we first must consider Section 312 of the 1933 Civil Code, which was the Code in force and effect at the time of the amendment to the articles.

There is nothing in Section 312 requiring any notice to be given of an intended amendment to the articles. [233]

The section was amended. In 1937 Code there appears an amendment there. I will read the original Code section as it stood at the time of the particular amendment in question.

312, "Shareholders Meetings. Directors of every

corporation shall be elected annually at a meeting of the stockholders, known as the annual meeting. Such meeting shall be held at 11:00 o'clock a.m. on the first Tuesday in April at the principal office of the corporation, unless a different place or time is provided in the by-laws. When the annual meeting is not held, or the directors are not elected thereat, directors may be elected at a special meeting held for that purpose, and it shall be the duty of the president and vice president or secretary, upon the demand of any shareholder, entitled to vote, to call such special meeting."

That is the extent of the Code section at the time this amendment was adopted on the 4th of March, 1935.

Now, going to the sections in the Code, in the 1933 Code, which have already been referred to, your Honor, under a specific chapter heading, where we find that under Chapter XIII of the Civil Code, Sections 361, 361(a), 361(b), 362, 362(a), 362(b), 362(c), all under the heading of Chapter XIII, "Organic Changes, Merger, Consolidation and Amendments." [234]

The first section refers to mergers and consolidations, 361.

The next section goes over and 361(a) goes to "Mergers and Consolidation of Domestic Corporations."

361(b), "Conveyance of Real Estate of Consolidation."

362 is the section that is pertinent here. "Amendment of Articles."

“By complying with the following provisions, a corporation may amend its articles for any or all of the following purposes”:

Then it has 11 separate provisions in respect to which the Articles may be amended, to Adopt a New Name; To Change or Add to its Power or Purpose; To Change the Location of its Principal Place of Business; To Remove any Provisions of Its Articles Limiting Its Term of Existence—” To increase, I should say—yes, that is right. “To Remove any Provisions of Its Articles Limiting Its Term of Existence.”

“(5) To Increase or Decrease the Authorized Number of Shares.

“(6) To Provide for the Classification of Its Shares.

“(7) To Change the Statement As to Its Shares.

“(8) To Authorize the Board of Directors Within Limitations to Restrictions to Fix or Alter from Time to Time the Dividend Rate. [235]

“(9) To Change Shares Having Par Value into the Same or a Different Number of Shares.

“(10) To Create Classes of Par Value Shares.

“(11) To Add to, Omit from, Remove or Otherwise Alter the Provisions Thereof in any Respect Lawful at the Time of the Amendment and not Inconsistent with the Law under Which the Corporation Exists * * *”

Then we go over to 362(a), which sets forth the vote required to amend the Article.

“A resolution providing for any amendment of the Article must be adopted by the vote of the ma-

jority of the directors of the corporation, and must be approved by the vote or written consent of shareholders or members holding at least a majority of the voting power either before or after the adoption of the resolution by the Board of Directors. Such resolution must establish the language of the proposed amended Articles by providing that the Articles shall be amended so as to read as therein set forth in full, or that any provision thereof, which shall be identified by stating the numerical or other designation given it in the Articles or by stating the language thereof, be amended so as to read as therein set forth in full, and/or that the matter stated in [236] the resolution be added to or stricken from the articles;

“Change in Shares. If the purpose of an amendment of the articles is to change the preference or restrictions of any class or series of issued shares, or to authorize the corporation to levy assessments on fully paid shares, then in any such case the amendment must be adopted by the vote or consent of the stockholders of at least two-thirds of the issued shares of each class regardless of limitations or restrictions on the voting power.”

Now, the record shows here the certificate of the Secretary of State, the amendment itself, the resolution accompanying it, which all were showing there were 1,740 shares out of 2,003, which gives, or, which brought it considerably above the two-thirds requirement set forth here in Section 362(a).

Then it goes on to specify a change in the number of directors, et cetera. Then it says:

“Approval of the Change. The resolution or consents of such shareholders approving any amendment must contain a copy of the resolution——”

which was done here.

“——of the directors or shall establish the wording of the proposed amended articles by providing that the articles shall be amended so as to read [237] as therein set forth.”

All of which was done here, from the exhibits in evidence.

“Or that any provision thereof, which shall be identified by the numerical or other designation given it in the articles or by stating the wording thereof, be amended so as to read as therein set forth in full, and/or that the matter stated in the resolution or consent be added to or stricken from the articles, and state the fact of the approval thereof.”

All of which was done.

Now we come to the Certificate of Amendment. Very elaborate provisions here, under this Chapter, your Honor, for the amendment of the Articles; minute in detail, specific. [238]

Then it goes on, in Section 362-b:

“After such approval has been given, the president or a vice president and the secretary or an assistant secretary shall execute a certificate, which shall be verified by their oath and shall set forth:

“Contents. The time and place of the meeting of the board of directors;

“A copy of the resolution adopted thereat;

“The vote in favor of such resolution;”——

all of which is in evidence before your Honor——

“The time and place of the meeting of the shareholders or members”——all of which is here——“and the total vote by which such resolution was approved,” all of which we have.

Then, “Filing of certificate. The certificate shall be submitted to the Secretary of State, who shall file the same and put an endorsement of filing thereon if he finds that it shows a compliance with the provisions of this section. Thereupon, the articles of incorporation shall be deemed amended in accordance with such certificate and a copy of such amendment and the certificate thereto, certified by the Secretary of State, shall be evidence of the performance of [239] the conditions necessary to the adoption thereof.

“A copy of said certificate certified by the Secretary of State shall be filed with the county clerk of the county in which the principal office of the corporation is located and in every county in which the corporation holds real property.”

Therefore, we have offered in evidence the certificate that it was filed with the County Clerk of the County of Ventura, with the certificate of the Secretary of State attached thereto.

Now, it is our contention that, first of all, at the time that this amendment was adopted there was no provision of any kind in the Code requiring the giving of notice. All the sections to which I have

referred, your Honor, are significantly silent. They have no notice requirements at all.

The Court: Aren't they to be read in conjunction with 312, as it then existed?

Mr. Hollingsworth: As it then existed, and 312 had no provisions of notice in it at that time. 312, under this Code, had no notice—had no provisions for notice at all.

Now, we come to this point: Did the Secretary assume——let's assume for the sake of the argument that notice was required. Then the question before the court is: Was notice given?

Is there any substantial testimony before the court to [240] the effect that notice was not given?

The only testimony before your Honor is testimony purely negative in character.

It is like a railroad crossing accident. The witness takes the stand, or a dozen witnesses take the stand and they say that the whistle was blowing, the bell was ringing, the wigwag was in operation. Then they call some other witness who was in the immediate vicinity, and he says he never heard a whistle, he never heard a bell, or he never saw the wigwag operating. Purely negative testimony.

The only testimony before your Honor is that purely negative in character. The statement that somebody did not get a notice through the mail, assuming that notice was required, is purely negative.

If there were any other testimony before your Honor in the minutes of the corporation, by any officer, by any director, by anyone present at this

meeting, that no notice was given, that no directions were ever made to mail out notices of an intention to amend, then we would have a substantial conflict in the testimony. That I grant.

But it is a strange thing that this would go on for over 15 years after the amendment, and for some five years, or I think seven years, after Mr. Lucking's last purchase, when he took under the amendment, before he filed his lawsuit. [241]

Now, what is the court to do if you feel that there is anything in the statute requiring notice? Here is a corporation that has been running along for over 20 years under this amendment. Many people have purchased land, both from Libbey and from outside sources, and have had stock issued to them, and they are receiving their water.

Is it the policy of the court to go back and tear apart, and try to shatter into bits a situation which has been going along for approximately 20 years uncontested and unquestioned?

I will come to the merits of the contention of whether or not it means anything in this case if the amendment is either good or bad. But isn't it the policy of the court to adopt the strong language of the Code itself when the certificate bears the imprimatur of the Secretary of State—a man who is supposed to know his business, and which the Code says, when he certifies it, is evidence of the compliance with the necessary requisites in order to bring the amendment into effect?

That type of evidence, your Honor, seems to me, if there is any question in anybody's mind about

whether or not notice was given, assuming that notice was given, should settle the matter and put it at rest.

Now, a very significant thing here that I have checked into, and I am taking over the new Corporations Code. The amendments to articles are found in Sections 3600 to 3604—[242] 3600 to 3604, and there is nothing in the present Code requiring the giving of any notice to amend the articles of incorporation.

I think what they have done is they have gone right back to the old practice in 1933 and for years prior to that time.

Section 312 was amended—and I checked through Valentine on Corporations, and all the corporate law I could find, and at one time in California it was necessary to publish in a newspaper a notice to amend the articles of incorporation. That was eliminated by statutory amendment, and under Section 312 here there was no notice. That section was added by the statutes of 1931.

Now, prior to that time under the McDermont case here, it was necessary to give notice in order to amend, and that was completely eliminated. The early history—when I mentioned Section 312, I meant Section 362. I beg your pardon, because Section 362 under the early amendment showed that notice was at one time required in order to amend the articles. Now, 361 to 361-b were amended to eliminate that provision.

The case of McDermont v. Anaheim Union Water Company, 124 Cal. 112, held that the amendment to

the articles of incorporation has never been adopted or approved by a vote or written consent of the stockholders of said corporation representing at least two-thirds of the subscribed capital stock [243] thereof, nor has any notice of the intention to make said amendment been advertised in any newspaper published in the town or county in which the principal place of business of said corporation is located—that was the requirement at one time of Section 362, and that has been completely eliminated.

Now, under these other sections of the current Corporations Code, it has here Sections 3600 and 3601. 3600 is amendments relating to, “Adopting new name: Changing powers: Changing location of principal office: Changing number of directors.”

Section 3601 is, “Amendments relating to shares,” and Section 3601 says, “By complying with the provisions of this chapter,” and the chapter that I refer to is Chapter 1, Part 8, under the heading, “Amendment of Articles.”

“By complying with the provisions of this chapter, a corporation may amend its articles for any or all of the following purposes:

“To increase or decrease the authorized number of its shares,” and to provide for the classification of its shares, to change the statement as to shares issued or unissued, to authorize the board of directors to fix or alter the dividend rights, to change shares having par value into the same or a different number of shares without par value, to create classes of par value [244] shares together with classes of shares without par value, and so forth.

There is no provision whatsoever in Section 3601 requiring the giving of any notice, and the legislative history of the entire situation must show that the courts in their decisions and the text writers in their commentaries have proceeded upon the theory that no notice to amend the articles was necessary, unless this newspaper notice, that was required prior to the decision in the McDermont case.

The Court: Doesn't this argument rather lead you to believe that those advising the corporation at the time were of the opinion that no notice was required, and that no notice was actually given?

Mr. Hollingsworth: I don't know, your Honor. I can't tell. That is what we tried to find out, but we were unable to find it out. It was done by a very strong and reputable law firm, and that exhibit, the certificate of the Secretary of State, shows it is on their legal paper.

The Court: Was it Robert Clark?

Mr. Hollingsworth: No, he organized the corporation, but the amendment shows on the legal paper here of Sheridan, Orr, Drapeau & Bates, and they were the law firm whose name is shown here in the lower left-hand corner.

It is on their stationery, and I can say to your Honor that it is one of the affidavits in the case here that they had destroyed their records. [245]

At the time, according to the affidavit, I think they cleaned up their offices and threw out everything. I don't know whether it was five years old or fifteen years old, or what it was, but, anyway they destroyed it.

And reading between the lines, it is my feeling that a law firm of that stature certainly weren't going to amend the Articles of Incorporation of this company, without knowing what they were doing. And it is my feeling in the matter that if notice was required it was given. Unfortunately, we cannot get the file. The file has been destroyed. That would have answered the question.

The Court: Would it not be inconsistent for this court to find, or, to conclude that notice was not required and then to find that notice was given?

Mr. Hollingsworth: That is very true your Honor. But if notice was required, then according to the evidence before the court, notice was given.

I don't know, I think the Code sections speak for themselves, your Honor. If there was no requirement in the 1933 Code for notice, then the matter takes care of itself. But if there was a requirement for notice, there is ample testimony before the court to the effect that notice was given, because, as I have said, there is no substantial conflict against the presumption that if notice was required, notice was given, when the Secretary of State permitted the filing of [246] the Articles of Amendment and put his certificate on it.

Now, there are other things here under this amendment. Whether or not the amendment was valid or whether it is proper under the circumstances, I am prepared to argue that. But I think that that is a little bit outside the issues before the court; as I understand, the only issue be-

fore your Honor is, was notice required, and if notice was required, was notice given. I think that is it.

Mr. Lucking Jr.: If your Honor please, were you going to correct that impression in accordance with the statement made immediately prior to recess at 11:00 o'clock? I believe the whole question was up.

The Court: State your position and——

Mr. Hollingsworth: You mean you want me to argue other phases of the case?

The Court: He said am I going to correct an impression——

Mr. Lucking, Jr.: I had understood that our argument at this time would also go to the question of whether or not the 1935 amendment was valid, regardless of whether notice was or was not given, or even notice was or was not required. Is that correct?

The Court: What the court intended was that we argue, have argument now on what Mr. Hollingsworth has argued, and then any other motions which will pose any other legal questions will be made by whoever feels they want to make them, [247] so that by the end of adjournment this afternoon we will have our way clear on these legal questions.

Mr. Hollingsworth: I can proceed to do that now.

The Court: All right.

Mr. Hollingsworth: I will address myself very briefly to your Honor at this time on the validity of the amendment itself, which was necessarily as-

sumed it was made in accordance with statutory provisions and regulations, covering that in the argument.

Now, the question is, is the amendment valid, assuming it was properly adopted, in the first place? My answer is an unqualified yes, because under the so-called business and judgment, the business judgment rule of the Delaware courts, adopted in California, and expressly referred to in Ballantine & Sterling's California Corporation Laws, page 377, Section 306, reads as follows:

“The ‘business judgment’ rule of the Delaware courts, which is generally followed, giving wide discretion to directors and to majority shareholders, the presumption of good faith and fairness on the part of the directors and majority vote of the shareholders, and the consequent heavy burden of proof upon a dissenting minority to induce the courts to substitute their judgment for that of the directors and shareholders all operate [248] to restrict the equitable limitations upon unfair action for the most part to instances of fraud and confiscation. The burden of justification of an amendment making drastic changes in the contract rights of a class of shares, where the interests of the management and of different classes of shares conflict, ought obviously to be put upon the proponents of the plan to show a reason justifying such scaling down in the needs and exigencies of the corporate enterprise, a doctrine recognized in the *De Mello* case.”

We have no such situation as they had in the *De Mello* case, But the presumption is that the direc-

tors and officers and 1,740 of the represented shareholders acted in good faith.

We allege and set forth in our pleading, and if we have to we are prepared to prove why we reduced the requirements of four shares per acre to one share per acre. It was an economic factor, which the directors were faced with, and it can be explained in detail.

The De Mello case is reported in 73 Cal. App. (2d) 746. That was a reorganization case, and, of course, is entirely different from this case.

Now, the Delaware business judgment rule, which I have referred to, is, as I understand it, the rule in California, and is adopted by the courts here, as I have stated it to [249] your Honor.

It hardly works out with the court, in view of the evidence before you now, to make any holding or any finding to the effect that the amendment itself is not proper and was not valid from the standpoint of corporate business practice. We didn't deprive anybody of any shares. Everybody was left exactly as he was on the date of the amendment.

It only applied to future purchasers of stock in the Water Company. It had no bearing or any effect whatsoever, no harm, no injury of any kind was done to any stockholder of record, as of the date of the amendment. Although their rights were reserved, they still got their water, and continue to get their water right up to the present moment, and so are all of the shareholders who purchased stock

in the corporation subsequent to the date of the amendment.

Now, I want to make a motion at this time, may it please the court, to refuse to receive any evidence under the Complaint Nos. 13,197-T and 15,804-T on the grounds heretofore urged upon the court, that the whole matter, before your Honor is purely a question of law.

The Articles of Incorporation, as I have previously stated, show the stock to be non-appurtenant. It doesn't make any difference, your Honor, one way or the other, whether the stock is or is not appurtenant, so far as the issues in this case are concerned. [250]

All it means is this: If the stock is appurtenant, which, under the Articles it is not, and which we claim it cannot become legally appurtenant without a compliance with the statutory provisions to which attention has been called, but let's assume that the stock is appurtenant. Certainly, Mr. Lucking's stock is not appurtenant. He doesn't so allege, and, as a matter of fact, it is not. He won't deny it.

But assuming that it is or could be made appurtenant, that doesn't alter the situation at all. It just simply means this: That if somebody has a share of stock appurtenant to a hundred-foot lot or a ten-acre tract of land or a fifty-acre tract of land, it simply means when the land is sold the stock goes with it. So what?

In other words, you couldn't pass title to his stock, he couldn't, to somebody else, without transferring his land with it. But that is all taken care

of under the Articles, because we say specifically in our Articles the ownership of stock or the ownership of land doesn't entitle the user to water. That is purely an issue of law, whether it is appurtenant or non-appurtenant.

Now, we can't——

The Court: I take those remarks to mean that you have a contingent motion, that you want me to refuse to receive evidence and not receiving any to thereupon dismiss the complaint? [251]

Mr. Hollingsworth: Yes.

The Court: Those are the motions we will have to rule upon.

Mr. Hollingsworth: That is true. Those motions are now before—I think I have already made the motions and they are before the court.

But I can, on other motions here, I can make relative to the testimony that came in here this morning, that would have to depend on your Honor's ruling on these other motions.

The Court: We have a decision to make on this question of whether the Articles are validly amended.

Mr. Hollingsworth: Correct.

The Court: That is one cause of action.

Mr. Hollingsworth: Yes.

The Court: The other causes of action are attacked by a motion for an order of the court that no evidence be received. And then there is a motion contingent upon the granting of the motion I have just referred to, to dismiss the complaint.

Mr. Hollingsworth: Yes, your Honor. That is true, but, your Honor, the original motion that was

made here was also to dismiss on the same grounds the cause of action, alleging the invalidity of the amendment, because it appears on the face of the pleading here that the amendment to the Articles was filed, it was filed with the County Clerk, with the certificate of the Secretary of State attached thereto. [252]

It all comes down, aside from this question of the validity of the amendment, to an assertion on your part that the plaintiff has not set forth a claim upon which relief can be granted to him.

Mr. Hollingsworth: That is right. If he has, it is purely a question of law from the pleadings, and there is no need to take testimony. Your Honor can decide it, as a matter of law. [253]

* * *

Mr. Hollingsworth: What I was about to say was this, your Honor: That the plea of Mr. Lucking, in an endeavor to answer the contentions which have been made here concerning the actual record in the case, went as far afield and with as little relevancy to the matter before the court as could possibly be imagined.

Mr. Lucking has attempted here to make what I would determine to be a final argument to a jury in some kind of a case involving passion, prejudice, or an emotional attitude on the part of the plaintiff here, which is entirely beside the issues before the court.

He has made no comment or reply to his own

specific [318] causes of action. He has talked about a pile of \$20,000,000, back in Toledo. [319]

Is that going to impress the court?

He has talked about homeowners, home lovers. Is that going to impress a court?

Is there anybody here as a plaintiff in this action except Mr. Lucking?

Your Honor asked if it were a class action. We filed a motion here before this court under Rule 23, and there is absolutely no allegation in his complaint relative to a compliance with that rule, in the slightest degree.

If it is a class action, he at least should have done one thing for these suffering and downtrodden stockowners in the Mutual Water Company—who are up there practically, according to his plea to the court, in a state of bondage, mere children, mere pawns of the Valley Company.

There is no statement at all here in his pleadings, or any allegation in his pleadings that the plaintiff at the time of the transaction of which he complains, or that the action was not a collusive one to confer on a court of the United States jurisdiction of any action.

The complaint should also set forth with particularity the efforts of the plaintiff to secure from the management, directors or trustees, and, if necessary, from the shareholders such action as he desired, and the reasons for his failure to obtain such action, or for not making such effort.

Now, these stockholders, these poor stockholders, who [320] have been going along for 35 years without a complaint, without a grievance, and nobody

has ever complained of water service, water rates, treatment or dealings at the hands of the Water Company except Mr. Lucking, and yet he has the effrontery to come into this court and contend that he represents a class action.

Your Honor, there is no more of a class action here than to come in here in a personal injury case and allege that you are bringing your action in order to correct reckless driving or negligent driving on the highways of this state. It is just about as implausible and just about as ridiculous as that.

If all these terrible things that Mr. Lucking has talked about have actually continued up there for all these years, and these poor homeowners are in fear, in trepidation of what is going to happen, what is going to occur, who is going to get the water, and what is going to go on, well, he might just as well have addressed your Honor as to what would happen if an atomic bomb were to fall down here next week.

Then he talks about Jarndyce against Jarndyce, a Dickens classic.

Who started this lawsuit? Who filed the second suit, or each of the other suits, and who has kept the thing agitated? Who is appealing to the passion and prejudice, going so far as to say that he submitted a stipulation? [321]

He knows very well that a statement on a compromise of a lawsuit of any kind is absolutely inadmissible. Yet he does not even hesitate to stand up before your Honor and say that he submitted a stipulation trying to settle this lawsuit.

Well, it never could have been settled on that stipulation, your Honor. I don't like to mention it. I have never referred to it in the progress of this case, and I have kept away from extraneous things that have no bearing upon the motions before your Honor.

What pertinency can it have that somebody can stipulate with him or that somebody would not take a program, and how could I stipulate to: The Valley Company will have to do this; the Valley Company will have to do that; the Water Company will have to do this, or else. But he says it is all on behalf of the poor homeowner.

He is the Sir Galahad charging up in the Ojai Valley to save all these people from destruction and ruin. [322]

The school district doesn't seem to be so concerned about it, the State of California has never gone to the Attorney General's office and demanded something be done here to rectify this terrible situation.

Nobody but Mr. Lucking has ever complained. He can't find one shareholder, one stockholder in that Water Company—and I say it because of the remarks Mr. Lucking has made to your Honor, and for that reason only—he cannot bring a stockholder before your Honor who can complain of water service, water charges or anything in connection with it and he has no cause of action before this court, nor has he attempted to set up one that we, in violation of the by-laws of this corporation, refused to make an assessment of the stock of the

mutual water company, in order to pay for capital investment.

But he doesn't tell your Honor that the money was loaned, interest-free, and that no increase of rates ever occurred, and that it was much cheaper from a financial standpoint on the present and existing water users, at the time the money was loaned, to let them have it interest-free, and to pay it back out of water used, but with no increase whatsoever on water rates; none whatever.

It was just as fair and just as just and just as charitable and just as able as it could possibly have been under the circumstances, but even if it were not true, why [323] didn't he set up a cause of action.

The Court: That issue is not presented by the amended complaint.

Mr. Hollingsworth: It certainly is not, your Honor. But he has argued it here to your Honor, as if it were before the court.

That is the thing I can't understand. I want to go back and review again very briefly the real thing that is before the court. What is before the court?

Now, he has talked about appurtenance, all of his argument, all of his complaints, all of his criticism, all of his fearful speculations here of what might happen or what could happen, or what would happen are pure speculations, pure surmise and conjecture. But all of his talk cannot change the plain equivocal working of the articles of incorporation.

I am staying with the pleading. And he set up in his pleading the articles of incorporation, not only of the Mutual Water Company but also the certificate of amendment to the articles of incorporation. They are all set forth there. He can't talk himself out of that. He can't talk himself into making this stock appurtenant, contrary to the plain provisions of the articles. Nor can he talk himself into making the amendment invalid just because he claims it is invalid. That matter is before the court for [324] your decision.

But let us see now where we come. His first cause of action is based upon a fallacy which appears as a matter of law, and he hasn't answered it, he hasn't attempted to answer it.

Where in his complaint is there any allegation that under the articles of incorporation and under the by-laws of the Mutual Water Company we can furnish stock only to people deriving title from Libbey? There is no such allegation, because the articles of incorporation on their face show that such is not the fact. There is no need to reiterate it, but there it is, the first cause of action.

The second cause of action is based upon the theory of the invalid amendment that is before the court. I need not expatiate on that.

No. 3, he goes back and attempts to try a water suit here. There is nothing before this court, no allegation at all to the effect that any land owned by Mr. Lucking overlies a percolating water basin, a known and defined structure bearing water, and that when the Ojai Mutual pumps its water to any

of its stockholders, that it deprives Mr. Lucking of water he would otherwise receive, or to which he would be entitled. There is nothing of that kind in his complaint; not a thing.

Yet he wants the court, which would necessarily follow, [325] if the court took that at its face value and took his argument for what it was worth, you would have to sit here and try a water suit. But he has not alleged that as an overlying landowner's land, that his real property overlies a basin of water, that he has water or would have water available in sufficient supply were it not for some act or acts on the part of the Mutual Water Company or The Ojai Valley Company. There is no such allegation.

He just throws it in there by way of scenery, claiming that he is being injured as an overlying landowner. No allegation sufficient to support a water suit. Your Honor caught it immediately. You asked him, "Are you asking me to try a water suit?"

Are we going into all the geological factors here on that sort of a pleading? If we did it might take 30 days, it might take two months to go into it. I brought it up on the original demurrer, the original motion to dismiss and pointed out to the court at that time we were not trying or endeavoring to litigate a water case in this court, under any such an allegation.

Now, his fourth cause of action, he claims that we made an unjustified profit on the sale of the stock, claiming that Mr. Libbey had put \$100,000 in the water system before the Mutual was formed.

That he turned it over to the Mutual for 2,000 shares at \$50 par. [326]

Is there anything unjust or inequitable about that? Didn't he have a right to take out his stock? The permit from the Commissioner of Corporations specifically shows that he was authorized to do it at \$50 a share, because he had \$100,000 or more in the property at that time. But he took it at a round figure of a hundred thousand dollars.

Now, is it the law of this case, is it the law of this country that 35 years later, when the Valley has progressed, when prices have gone up 50, a hundred, maybe in some instances two and three hundred per cent, that we can't sell this stock, still owning it, if we can find a buyer that wants to buy it, for more than \$50? Is that an unwarranted or unjustified profit?

Where is there any cause of action there? Does he allege this was watered stock? That it has a value of five or ten dollars a share and we are compelling people to pay more for it than it is worth, when they want to buy a share? That nobody can get stock up there without having to come in and pay more than it is worth? There is no such allegation in the pleading.

We have a right to our own, we have a right to sell it, we have a right to keep it. We are not compelled to be dictated to by Mr. Lucking, as to what the stock is worth, as to when it shall be cancelled, as to when it shall be taken off the books of the corporation. We can't stand for [327] that,

your Honor, nor do we intend to stand for that on Mr. Lucking's position here.

It is quite apparent that he is full of prejudice, that he is full of animos, and that he is trying here, under the guise of the good shepherd, to come in before your Honor and take care of all these poor wandering sheep up there in the Valley that don't understand their rights, that can't wrestle with this very simple situation, but it is just a little bit too much for them. And along comes Mr. Lucking, who spends a very few days out of the year in the Ojai Valley, and sets up a cause of action here based upon these very things which, on their face, conclusively show they do not state a cause of action, because his whole theory on the calculation of the stock is based upon the proposition that we are holding surplus shares of stock.

How are they surplus? Because he alleges, contrary to the articles, that they can only be furnished to owners of Libbey land and nobody else? That is the thread of the complaint, right from the start to the finish. Nobody else can acquire any shares of stock up there, except the owners of Libbey lands. That is what the court has got to hold, in order to satisfy his demands that we cannot sell a share of stock to anybody that didn't derive title from Libbey.

Yet his own witness here, Dr. Butler, admitted that he got his shares from non-Libbey owners. And there are plenty [328] of others. I don't see why it is necessary for this court to take days of testimony here to determine each transaction. "Well, when you

sold 10 shares of stock, who did those people derive title from? When you sold another 20 shares of stock, who did those people derive title from?"

It could go on and on here, contrary to the plain provisions of the articles themselves.

His fifth cause of action, his sixth cause of action is upon the theory that the stock is appurtenant to the land, despite the fact that he doesn't allege it is appurtenant in his own case. It can't be made appurtenant, except by the statutory provisions.

What concern is it of his—let's assume in this statement—but he doesn't plead it, it is not in his pleading. I think it is entirely outside the issues, but let's assume now he offers proof here, and we did write the word "appurtenant" on some certificate of stock, under certain instances, and assume that we did, does that make all the other stock appurtenant?

Supposing that stock is appurtenant that was issued to some purchaser, and which carried the word "appurtenant" that was written on there, supposing we did do that, what avail is it to him, where does it benefit him, why doesn't he bring an action here to quiet title, or something of that kind, to set up before this court the question as to whether or not [329] this stock should be held to be appurtenant.

There is no such action before the court, except that he alleges, all he does is allege, that it is appurtenant. But he doesn't allege his own stock is appurtenant. None of the stock that he purchased, there is no allegation that he sets forth—he sets

forth every date and every acre that he purchased, but there is not one allegation in that complaint to the effect that that stock that he purchased was appurtenant at all. He just makes a broadside shotgun allegation that the stock in the Mutual Water Company is appurtenant to the land. It is just a talking complaint, just like his argument to the court here. He just kept talking and talking, but he didn't stay on the track.

Certainly, he has handed me something here. I haven't seen it. Minority stockholders, I can't stop and read through this thing. It is all marked up. He has handed it to the court. Your Honor has been deluged with authorities and argument and everything.

I will keep this, unless you want to give me one that hasn't got that writing on there.

Mr. Lucking, Sr.: You want it tonight?

Mr. Hollingsworth: You can give it to me tomorrow.

Mr. Lucking, Sr.: I will hunt for one that is clean.

Mr. Hollingsworth: I don't care about your writing on there. There might be something though you don't want me [330] to see.

Mr. Lucking, Sr.: No, I don't call names in writing.

Mr. Hollingsworth: I don't call names, either, Mr. Lucking.

Mr. Lucking, Sr.: I stopped that years ago.

Mr. Hollingsworth: You have questioned my

honesty here. You got up and said something about my honesty, when you were arguing to the court.

All I can say is this: If I am going to take a lesson in honesty, I think you will be one of the last men I will call on for that matter. [331]

I don't think it was justified when you said it, and I still feel you have strayed clear off the reservation here in your argument to the court.

I am willing to stay with the record in this case, and I still maintain, your Honor, that he has no standing under this pleading before this court.

I renew the motion in good faith and in all sincerity.

The Court: The court reaches the conclusion as to Section 312 of the Civil Code, as that Code existed at the pertinent time, that notice was required to be given of a shareholders' meeting, even if it was a regular annual meeting, provided that it was a meeting at which it was provided to amend the Articles of Incorporation.

The evidence which has come in here on the cause of action, relating to the alleged meeting as to the amendment, being, particularly the evidence there were other meetings, as to which there was no notice given, was not actually pertinent evidence, because there was no showing that those other meetings were meetings of a kind, which, under Section 312, required notice.

There is no need for notice of a regular annual meeting unless it was a meeting to take up a particular class of subject. There is a presumption of regularity, or, rather, there are a group of pre-

sumptions which relate to regularity. You will find them enumerated in the California Civil Code, or [332] they were last there when I last had occasion to find out where they were. They are in the evidence sections somewhere under those presumptions, and I think there are presumptions in the common law as well of the actions of the management of the defendant in calling the meetings would be presumed to be regular. [333]

It would take evidence to repel that presumption.

The court finds that there is not sufficient evidence to overcome the presumption of regularity with respect to the amendment of the articles of incorporation.

That I think was pleaded as a separate cause of action, and as the court has taken evidence on that cause of action, and has reached that conclusion, I suppose that judgment should be ordered, and it is ordered for the defendants upon that cause of action. [334]

* * *

Nos. 14945-14946.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a corporation, and THE
OJAI VALLEY COMPANY, a corporation.

Appellees.

REPLY BRIEF OF APPELLEES.

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TOPICAL INDEX

	PAGE
Statement of the pleadings and issues.....	1
The theory of the complaint.....	1
Plaintiff's alleged second cause of action.....	3
Plaintiff's alleged third cause of action.....	3
Plaintiff's alleged fourth cause of action.....	3
Plaintiff's alleged fifth cause of action.....	3
Plaintiff's alleged sixth cause of action.....	3
Plaintiff's alleged seventh cause of action.....	4
The answer	4
The further separate and sixth defense of defendants.....	4
The further separate and seventh defense of defendants.....	5
The further separate and eighth defense of defendants.....	5
The further separate and ninth defense of defendants.....	5
The pleadings in case No. 14946.....	5
The answer to complaint No. 14946.....	6
An analysis of the complaints in actions Nos. 14945 and 14946 plainly shows the correctness of the court's action in barring the taking of further testimony in these cases.....	7
The testimony produced by the appellant on the issue of notice relative to the amendment of the articles entirely failed to establish that notice had not been given as required by law.....	9
The testimony of William Alfred Lucking.....	9
The testimony of Charles Justus Wilcox.....	10
The testimony of Rawson B. Harmon.....	10
The testimony of Charles T. Butler.....	11
The court's ruling was correct that there was no evidence produced by appellant establishing the invalidity of the March 4, 1935, amendment to the articles of incorporation....	11

ii.

	PAGE
Appellant's argument that the court's findings of fact with respect to notice are contrary to the evidence, is without merit	15
The certificate of the Secretary of State of the amendment of the articles of incorporation of the Ojai Mutual Water Company is proof of the fact of compliance respecting the giving of notice.....	18
Appellant's argument to the effect that there was no recital in the minutes of the giving of notice of the amendment to the articles is unsound.....	19
Whether said actions 14945 and 14946 are properly pleaded class actions does not in any way affect the failure of appellant to state a claim upon which relief can be granted.....	20
The fact that the District Court sat as a court of equity did not entitle appellant to have his case heard when no valid claim upon which relief could be granted had been alleged....	22
Appellant's complaints do not state claims upon which relief can be granted.....	23
Both of appellant's complaints are in the same category in so far as failing to state a claim upon which relief can be granted	24
Appellant's own complaint shows that he owned stock in the Ojai Mutual Water Company, both before and after the amendment of March 4, 1935.....	24
Appellant's argument on fraud, dishonesty, overreaching and breach of fiduciary duty is a perfect example of ignoring the real situation set forth in his complaint.....	25
Appellant's argument under the first cause of action that the amendment is void is unfounded.....	28
There has been no breach or any threatened future breach of any agreement between appellees and their stockholders.....	31
Appellees in their answer pleaded Sections 337, 339 and 343, California Code of Civil Procedure, namely, the statute of limitations sections	33

Appellant's contention that appellees have been guilty of inequitable, autocratic and arbitrary acts and actions is groundless	35
Under the articles of incorporation of the Ojai Mutual Water Company the shares of stock are not appurtenant to the land	36
Where stock is not appurtenant to land it is considered as intangible personal property.....	37
Appellant's contention that because the right to receive water is in the nature of real property does not make stock in a mutual water company appurtenant to the land.....	41
Mutual water companies do not follow a uniform pattern in their organization	41
The relation between the stockholders and the corporation is one of contract.....	43
The Ojai Mutual Water Company's water supply has at all times been adequate and has been increasing rather than decreasing	44
In the first instance whether the water company is or is not an appropriator of water is outside the issues and has no real bearing on the merits of this appeal.....	45
Appellant's contentions under the sixth cause of action are a reiteration of his argument on the appurtenance of the water stock to the land which it serves with water.....	46
Appellant's attempt to bring the instant case within the provisions of the Carey Act, cannot be sustained.....	48
Water under the Carey Act is devoted to public use subject to public control.....	50
Conclusion	51
Appellant's contention that the Ojai Mutual Water Company was formed for the purpose of supplying water to the lands of Mr. and Mrs. Edward D. Libbey, referred to as the so-called Libbey interest, is purely fiction.....	51

TABLE OF AUTHORITIES CITED

CASES	PAGE
Ariasi v. Orient Insurance Co., 50 F. 2d 548.....	17
Bank of Napa v. Ferguson Burns Estate, 48 Cal. App. 319.....	19
Boswell v. Mt. Jupiter Mutual Water Co., 97 Cal. App. 2d 437..	29
Carter v. Blaine County Investment Co., 45 F. 2d 643.....	48
Central Trust Co. v. Southern Oil Corp., 8 F. 2d 338.....	20
Curtin v. Arroyo Ditch Company, 147 Cal. 337.....	42
Empire West Side Irrigation District v. Stratford Irrigation District, 10 Cal. 2d 376.....	32, 33
Franscioni v. Soledad Land & Water Co., 170 Cal. 221.....	47
Gordon v. Covina Irrigation Co., 164 Cal. 88.....	42
Judelson v. American Metal Bearing Company, 89 Cal. App. 2d 256	28
Lindsay-Strathmore Irrig. Dist. v. Wutchumna Water Company, 111 Cal. App. 688.....	29
McDermont v. Anaheim Union Water Company, 124 Cal. 112....	28
McFadden v. County of Los Angeles, 74 Cal. 571.....	50
Mound Water Company v. Southern California Edison Com- pany, 184 Cal. 602.....	30, 50
Olender v. United States, 210 F. 2d 795.....	18
Pacific States Savings and Loan Corporation v. Schmitt, 103 F. 2d 1002	46
Palo Verde Land & Water Co. v. Edwards, 82 Cal. App. 52.....	37, 38, 40
Perlman v. Feldmann, 219 F. 2d 173.....	27
Prosole v. Steamboat Canal Co., 37 Nev. 154.....	31
Schroeter v. Bartlett Syndicate Bldg. Corp., 8 Cal. 2d 12.....	43
Smith v. Hallwood, 67 Cal. App. 777.....	46
Subin v. Goldsmith, 224 F. 2d 753.....	26, 27
Twin Falls Land and Water Company, 79 F. 2d 431.....	46
Wheat v. Thomas, 209 Cal. 306.....	41

STATUTES	PAGE
Carey Act, Chap. 14.....	48
Civil Code, Sec. 324.....	38, 40, 47
Civil Code, Sec. 330.1	37
Civil Code, Sec. 362.....	13
Civil Code, Sec. 362a.....	13
Civil Code, Sec. 362b	12, 13, 14, 15, 16, 17, 18, 19
Civil Code, Sec. 2986.....	38
Code of Civil Procedure, Sec. 337.....	4, 33, 34
Code of Civil Procedure, Sec. 339.....	4, 33, 34
Code of Civil Procedure, Sec. 343.....	4, 34, 35
Code of Civil Procedure, Sec. 1823.....	16
Code of Civil Procedure, Sec. 1825(1).....	16
Code of Civil Procedure, Sec. 1827.....	16
Code of Civil Procedure, Sec. 1887.....	16
Code of Civil Procedure, Sec. 1888.....	16
Deering's General Laws, Act 9113.....	37
Federal Rules of Civil Procedure, Rule 23	21, 22
Federal Rules of Civil Procedure, Rule 23(b).....	27
Statutes of 1931, p. 1814.....	12
United States Code Annotated, Title 43, Sec. 641.....	48
Water Transfer Law (Stats. 1923, Chap. 377, p. 757).....	37
Federal Rules of Civil Procedure, Rule 36.....	44

Nos. 14945-14946.

IN THE

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vs.

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OJAI VALLEY COMPANY, a corporation.

Appellees.

REPLY BRIEF OF APPELLEES.

Statement of the Pleadings and Issues.

The original complaint in action 14945 was filed on the 20th day of June, 1951, and the amended complaint on the 30th day of October, 1951. Hereafter in this brief unless otherwise indicated any reference to the complaint means the amended complaint.

The Theory of the Complaint.

1. Summarized the complaint is based upon the fundamental proposition that appellant purchased a total of 70.13 acres of land in the Ojai Valley from Florence Scott Libbey and by reason of the purchase acquired 151 shares of stock in the defendant Ojai Mutual Water Company. [Tr. Rec. V. 1, pp. 5-8].

2. That only those purchasing stock from the so-called Libbey interests are entitled to shares of stock in the Ojai Mutual Water Company and when all the lands owned by

the so-called Libbey interests, as they are referred to in the complaint, have been sold that any stock left over, or remaining, is surplus stock and should be cancelled. [Tr. Rec. V. 1, pp. 8-9.]

3. The Ojai Valley Company is the owner of approximately 1500 shares of stock in the Water Company and by reason of that ownership exercises a controlling interest in the Water Company. [Tr. Rec. V. 1, pp. 11-12.]

4. That no one is entitled to receive water from the Water Company unless the lands to which water is supplied were acquired from the so-called Libbey interests.

5. That the amendment to the Articles of Incorporation of the Water Company requiring one share per acre instead of four shares per acre is invalid by reason of the fact that no notice of said amendment was given as required by law. [Tr. Rec. V. 1, pp. 8-9.]

6. That the Ojai Valley Company, nor the Libbey interests, so-called, ever owned or intend to acquire, or intend that more than 500 acres of land should be served by the Water Company. [Tr. Rec. V. 1, p. 9.]

7. That demand has been made on both defendants that the shares now owned and held by the Valley Company be cancelled or put in trust for the individual owners who are stockholders in the Ojai Mutual Water Company and that if the Ojai Valley Company sells its shares of stock in the Water Company in excess of \$50.00 that this would represent an unwarranted profit to the promoters of the Water Company. [Tr. Rec. V. 1, p. 13.]

8. That plaintiff is acting on his own behalf and for other individual owners of stock in the Water Company. [Tr. Rec. V. 1, p. 14.]

Plaintiff's Alleged Second Cause of Action.

1. The second cause of action is merely a reiteration in slightly different language of the proposition that the only lands entitled to water service are lands derived from the Valley Company or so-called Libbey interests. [Tr. Rec. V. 1, p. 15.]

2. That by reason of the invalid amendment to the Articles of Incorporation of the Water Company the plaintiff, and the other grantees of Ojai Valley Company and the Libbey interests have been deprived of the control of the Water Company. [Tr. Rec. V. 1, pp. 16-17.]

Plaintiff's Alleged Third Cause of Action.

1. This alleges the invalidity of the amendment of the Articles of Incorporation. [Tr. Rec. V. 1, pp. 17-18.]

Plaintiff's Alleged Fourth Cause of Action.

1. This alleges that the Ojai Valley Company will receive unwarranted and unjustified profits by the sale of the stock owned and held by it, which it is alleged are surplus shares. [Tr. Rec. V. 1, pp. 18-19.]

Plaintiff's Alleged Fifth Cause of Action.

1. This alleges that there is insufficient water in the Ojai Valley Basin and that plaintiff and the shareholders have made actual and beneficial use of the water; that no others have any rights to the use of this water. [Tr. Rec. V. 1, pp. 20-21.]

Plaintiff's Alleged Sixth Cause of Action.

1. This alleges that the shares of stock in the Ojai Mutual Water Company are appurtenant to the land but have been treated and held as personalty. [Tr. Rec. V. 1, pp. 21-22.]

Plaintiff's Alleged Seventh Cause of Action.

1. This alleges that the Ojai Valley Company has no right to own, vote or sell any of the 1300 shares of surplus stock owned by it in the Ojai Mutual Water Company and that it claims the right to and threatens to sell said stock, all to plaintiff's injury and the other shareholders in the Water Company. [Tr. Rec. V. 1, pp. 22-23.]

We have set forth the gist of the allegations of the complaint in action No. 14945, and later on in this brief will refer to the complaint in case No. 14946.

The Answer.

The answer of defendants denies generally and specifically all the material allegations of the complaint and each and every alleged cause of action therein set forth. Defendants also set up special defenses to each and every alleged cause of action that they were barred by Sections 337, 339 and 343 of the Code of Civil Procedure. [Tr. Rec. V. 1, pp. 67-68.]

The Further Separate and Sixth Defense of Defendants.

Under this defense the defendants alleged, in substance, the acreage owned by plaintiff and the shares of stock which had been issued to him for water service; also that in June, 1945, pursuant to a purchase of 20.92 acres of land the plaintiff received 20 shares of water company stock for service of water to this land. This was six years before the filing of his complaint.

This special defense further sets forth the reasons for the amendment to the Articles of Incorporation, which was done by reason of the heavy increase in population requiring the extension of water service within the service area, which comprised 2,675 acres of land, being some

2,000 acres in excess of the lands to which plaintiff claims were the only lands to which water could be furnished, namely, lands which were purchased from The Ojai Valley Company or from what he terms the so-called Libbey interests. It is further alleged that, knowing and being acquainted with these facts the plaintiff did nothing and permitted defendants to extend their water service to consumers within the service area. [Tr. Rec. V. 1, pp. 69-79.]

The Further Separate and Seventh Defense of Defendants.

Defendants also interposed a seventh defense, alleging estoppel on the part of plaintiff by reason of the facts and matters alleged and set forth in the sixth defense. [Tr. Rec. V. 1, pp. 79-80.]

The Further Separate and Eighth Defense of Defendants.

This sets up the defense of waiver as against the plaintiff. [Tr. Rec. V. 1, p. 80.]

The Further Separate and Ninth Defense of Defendants.

The gist of this defense is that by reason of the facts alleged and set forth in the Sixth Separate Defense plaintiff has acquiesced in and consented to the various acts by defendants which are complained of by him. [Tr. Rec. V. 1, pp. 81-82.]

The Pleadings in Case No. 14946.

We will not burden the Court with a paragraph by paragraph recital of the allegations contained in this second complaint. It is entitled "Action for Accounting, Injunctive Relief and for Further Relief." It contains

many paragraphs which are repetitious of the first complaint, namely, No. 14945, relative to the invalidity of the amendment to the Articles of Incorporation, and the purchase and ownership of stock by plaintiff, the complaint in action No. 14946 also alleges discrimination on the part of Ojai Mutual Water Company in furnishing and delivering water to its consumers, claiming that certain consumers have been receiving water at a lower cost than other consumers. [Tr. Rec. V. 1, pp. 3-38, Case No. 14946.]

The Answer to Complaint No. 14946.

The answer denies all of the material allegations of this complaint and sets up separate defenses of the statute of limitations and that the plaintiff knew of the existence of the amendments to the By-Laws and the purpose and reason for the same and that he accepted twenty (20) shares of stock on the basis of one share per acre some ten years after the amendment to the Articles of Incorporation, where one share per acre had been adopted and that plaintiff had been guilty of laches in now asserting any right, claim or interest that he may now have or claim to have against said defendants under what he contended to be an invalid amendment to the Articles of Incorporation. [Tr. Rec. V. 1, pp. 38-56, No. 14946.]

Following the filing of the first case, No. 14945, and prior to the filing of the second case, No. 14946, a motion was made to dismiss on the ground of failure to state a claim upon which relief can be granted, or in lieu thereof to require that the action be stated in a simple, concise and direct manner. This was denied. We make mention of this fact, however, for in the later pages of this brief we will point out the reasons why an objection to evidence was made on the part of the defendants and the correct-

ness of the Court's ruling barring the taking of further testimony and the dismissal of said actions at the time of trial. [Tr. Rec. V. 1, p. 55, No. 14945.]

An Analysis of the Complaints in Actions Nos. 14945 and 14946 Plainly Shows the Correctness of the Court's Action in Barring the Taking of Further Testimony in These Cases.

The whole theory of appellant's complaint upon which he bases his cause of action is the fact that when the Ojai Mutual Water Company was organized that stock in this company could only be sold to those who derived title from The Ojai Valley Company, the Ohio corporation, or from what plaintiff repeatedly refers to in his complaint as the so-called "Libbey interests." We take this to mean either Edward D. Libbey or his widow, Florence Scott Libbey.

This conception on the part of the appellant is pure fantasy and totally unrelated to the realities of the situation. It is pure fiction, conceived by the appellant, for the purpose of having the shares of stock owned by The Ojai Valley Company cancelled and declared to be surplus and no longer needed for water users or land owners within the service area. In making this contention appellant overlooks the fact that he has pleaded and set up *in haec verba* the Articles of Incorporation and the amendment to the Articles of Incorporation of the Ojai Mutual Water Company and has marked them Exhibit "A" and Exhibit "B." [Tr. Rec. V. 1, pp. 26-35.] The Articles of Incorporation of the Water Company, it will be noted, contain a mete and bound description of the area subject to water service. This area comprises 2,675 acres. Under the original Articles of Incorporation any stockholder desiring to use water was required to be the owner of one share for each one-quarter acre of land or fraction there-

of, or to state it more simply, four shares per acre. [Tr. Rec. V. 1, p. 36.]

The amendment to the Articles of Incorporation provided that the owner of land should have at least one share of stock for each acre of land or fraction thereof. The original Articles of Incorporation were filed May 22, 1920, and the certificate of the Secretary of State to the amendment of the Articles of Incorporation was filed September 30, 1935. [Tr. Rec. V. 1, p. 34.]

The complaint alleged that The Ojai Valley Company had sold approximately 300 acres of land and further, that neither The Ojai Valley Company nor the Libbey interests intended to acquire or intend that there should be served by said Water Company facilities more than 500 acres of land. [Tr. Rec. V. 1, p. 9.]

This allegation in the complaint is in direct contradiction to the Articles of Incorporation which describe the service area within which users are entitled to water, amounting to 2,675 acres and we will point out in the later stages of this brief a substantial number of water users within the area described in the Articles of Incorporation never acquired nor purchased their land from The Ojai Valley Company or from what the appellant refers to as the so-called Libbey interests, whatever that phrase connotes, or whatever is intended to be meant by it. We can only assume it means Edward D. Libbey or his wife, Florence Scott Libbey.

Appellant, however, has indulged himself and gone on the assumption that because he purchased his land from Florence Scott Libbey, the widow of Edward D. Libbey, only what he refers to as the so-called Libbey lands are entitled to water service. Nothing could be farther from

the truth, and his own complaint and Exhibits "A" and "B" attached thereto completely negate any such theory or contention on his part.

The Testimony Produced by the Appellant on the Issue of Notice Relative to the Amendment of the Articles Entirely Failed to Establish That Notice Had Not Been Given as Required by Law.

The only attack leveled by Mr. Lucking to the amendment to the Articles of the Ojai Mutual Water Company on March 4, 1935, was that no notice of the meeting amending the Articles was given to the stockholders as required by law. There is no contention whatsoever by plaintiff that the amendment was not valid in all respects save as to the giving of notice.

The learned Judge of the Court below took evidence on this issue and listened to testimony from the witnesses produced by the plaintiff, namely, the plaintiff himself, Mr. Lucking, Charles Justus Wilcox, Charles T. Butler and Rawson B. Harmon.

The Testimony of William Alfred Lucking.

The appellant Mr. Lucking produced himself as a witness. He first testified that he never knew anything about the 1935 amendment and that he had a conversation with Mr. Harmon, in Harmon's office, wherein he stated that he, Lucking, had never known anything about the amendment to the By-Laws; that he never had any notice of it, or any understanding of it of any kind; that Harmon replied that no notice was necessary to him, Lucking, for that, to cover that amendment or that meeting of March 4, 1935 [Tr. Rec. V. 2, pp. 215-216] and that he recollected no other conversation with Mr. Harmon on this matter. [Tr. Rec. V. 2, p. 217.]

The Testimony of Charles Justus Wilcox.

The testimony of this witness was that he was president and treasurer of the Ojai Valley Company and the Ojai Mutual Water Company. He identified the minute book of the Ojai Mutual Water Company relating to the annual meeting of the stockholders on March 4, 1935. [Tr. Rec. V. 2, p. 199.] The minutes were offered and received in evidence. There was no recital in the minutes to the effect that any notice of this particular stockholders' meeting had been given. [A copy of these minutes can be found in Tr. Rec. V. 2, pp. 201-206.]

The Testimony of Rawson B. Harmon.

This witness was called as an adverse witness under Rule 43(b). Mr. Harmon testified that he had no independent recollection of the 1935 stockholders' meeting and that he had nothing to do with the Water Company at that time; that he became a stockholder sometime in 1930 and that he had no recollection whatever of having received actual written notice of a stockholders' meeting at or about that time (referring to 1935); [Tr. Rec. V. 2, p. 221]; and also that he knew of no notice having been sent out of any annual meeting to the stockholders generally. [Tr. Rec. V. 2, p. 228.] This witness also testified that the only recollection of any conversation that he had with the appellant, Lucking, was that under the By-Laws there was no obligation to give notice to the stockholders of the annual meeting and that he did not recall anything being said to him about an amendment to the By-Laws or the Articles. [Tr. Rec. V. 2, pp. 257-258.]

The Testimony of Charles T. Butler.

The testimony of this witness is found in Transcript of Record, Volume 2, pages 24-256. Plaintiff made an abortive attempt to prove lack of notice by this witness by showing that he kept a pad or pads on which he made notations from time to time of his activities. All this, the Court will bear in mind, took place some 20 years prior to the date of trial. Giving Mr. Butler's testimony every reasonable inference that it is entitled to, all that it amounts to is that he had no notation on his pad or pads or books that he had received any notice of the 1935 stockholders' meeting of the Water Company. [Tr. Rec. V. 2, p. 253.]

The Court's Ruling Was Correct That There Was No Evidence Produced by Appellant Establishing the Invalidity of the March 4, 1935, Amendment to the Articles of Incorporation.

The testimony of the witnesses above referred to on the issue of notice to the stockholders of an intention to amend the Articles of Incorporation of the Water Company clearly demonstrates that appellant entirely failed to prove the allegations of his complaint on this particular issue. If any reasonable inference can be drawn from the testimony of any of these witnesses to the effect that no notice of an intention to amend the Articles was given, we fail to see it. A reading of Mr. Lucking's testimony shows that he evidently was referring to the annual stockholders' meeting in one breath and to the meeting of March 4, 1935, in another, but Harmon had stated that no notice was necessary to him—Lucking—for that. If Harmon made any such statement it is of course not evidence that no notice was required or that no notice was given. It was purely Mr. Harmon's idea of the situation and not

concrete evidence of any kind to the effect that notice had not in fact been given of the intent to amend the Articles of Incorporation. The testimony of Mr. Harmon clearly indicates that he was talking about the annual stockholders' meeting, for which it is conceded by all parties that under the By-Laws no notice to stockholders was necessary, rather than to a meeting at which an amendment to the Articles was to come up.

Mr. Butler certainly did not add anything to the situation. His recollection was directed to the annual stockholders' meeting and not to any meeting relative to an amendment of the Articles.

We quote the Court's comment on this testimony which clearly summarized the situation, as follows:

"The evidence which has come in here on the cause of action, relating to the alleged meeting as to the amendment, being, particularly the evidence there were other meetings, as to which there was no notice given, *was not actually pertinent evidence*, because there was no showing that those other meetings were meetings of a kind, under Section 312 required notice. (Emphasis ours.)

* * * * *

The court finds that there is not sufficient evidence to overcome the presumption of regularity with respect to the amendment of the articles of incorporation." [Tr. Rec. V. 1, pp. 288-289.]

In coming to this conclusion the Court was amply supported by the law on the subject, expressed by Section 362b, 1933 Civil Code of the State of California. The history of Section 362b of the Civil Code shows that it was added by the Statutes of 1931, page 1814, and was in effect on the 4th day of March, 1935, the date of the

amendment of the Articles of Incorporation of the Ojai Mutual Water Company. Section 362 of the Civil Code sets forth the provisions with which it is necessary to comply relative to amending of the Articles of a corporation. Section 362a, Civil Code, specifies the vote required to amend the Articles. Section 362b, Civil Code, requires the execution and filing of a certificate by the proper officers of the corporation and the submitting of such certificate to the Secretary of State, who shall file the same and put an endorsement of filing thereon if he finds that it shows a compliance with the provisions of Section 362b. We set forth and quote that part of Section 362b, Civil Code, relating to the filing of the certificate, which at the time of the amendment to Articles of Incorporation of Ojai Mutual Water Company, March 4, 1935, read as follows:

“362b. . . .

Filing of Certificate. The certificate shall be submitted to the secretary of state, who shall file the same and put an indorsement of filing thereon if he finds that it shows a compliance with the provisions of this section. Thereupon, the articles of incorporation shall be deemed amended in accordance with such certificate and a copy of such amendment and the certificate thereto, certified by the secretary of state, *shall be evidence of the performance of the conditions necessary to the adoption thereof. . . .*” (Emphasis ours.)

The record shows that the appellant, in his amended complaint in case No. 14945, set up and attached as Exhibit “B” thereto the certificate issued by Frank C. Jordan, Secretary of State, in compliance with Section 362b,

Civil Code. [Tr. Rec. V. 1, p. 34.] This certificate reads in full as follows:

“Frank C. Jordan,
Secretary of State.

Robert V. Jordan,
Assistant Secretary of State.

Frank H. Cory,
Charles J. Hagerty,
Deputies.

State of California, Department of State

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in my office of which it purports to be a copy, and that the same is a full, true and correct copy thereof. I further certify that this authentication is in due form and by the proper officer.

In Witness Whereof, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 28th day of September, 1935.

FRANK C. JORDAN,
Secretary of State;

By CHARLES J. HAGGERTY,
Deputy.

Filed: Sept. 30, 1935, L. E. Hallowell, Clerk; By Irene Van Fossen, Deputy Clerk.”

Section 362b of the Civil Code provides that when the certificate is submitted to the Secretary of State, he shall file the same and put an indorsement of filing thereon, if he finds a compliance with the provisions of this section,

and the record shows this is precisely what the Secretary of State did. The section then provides that

“thereupon the articles of incorporation shall be deemed amended in accordance with such certificate and a copy of such amendment and the certificate thereto, certified by the Secretary of State *shall be evidence of the performance of the conditions necessary to the adoption thereof.*” (Emphasis ours.)

The record also shows under Exhibit “B,” appellant’s amended complaint, case No. 14945, a compliance with Section 362b of the Civil Code by the officers of Ojai Mutual Water Company, together with the resolution of the amendment of the articles of incorporation, all of which appellant made a part of his cause of action in said Exhibit “B” referred to. [Tr. Rec. V. 1, pp. 35-40.]

Appellant’s Argument That the Court’s Findings of Fact With Respect to Notice Are Contrary to the Evidence, Is Without Merit.

Appellant has jumped to the conclusion that the provisions of Section 362b of the Civil Code above referred, create a presumption only. This is an erroneous conception of the situation. The language of Section 362b, Civil Code, above quoted, do not state that it is a “*presumption*” of the performance of the conditions necessary to the adoption thereof, namely, the amendment, but that it “*shall be evidence*” of the performance of the conditions necessary to the adoption thereof. (Emphasis ours.) Thus we have an express, statutory declaration that the filing of the certificate of amendment by the Secretary of State shall be *evidence* of the existence of a fact, namely, the performance of the conditions necessary to the adoption of the amendment to the articles of incorporation.

“Evidence” is defined by Section 1823 of the Code of Civil Procedure, as follows:

“Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.”

A definition of the law of evidence, under Section 1825, Code of Civil Procedure, subdivision 1 thereof, reads as follows:

“The law of evidence, which is the subject of this part of the code, is a collection of general rules, established by law:

1. For declaring what is to be taken as true without proof. . . .”

Section 1827 of the Code of Civil Procedure specifies four kinds of evidence: 1. The knowledge of the court; 2. the testimony of witnesses; 3. writings, and 4. other material objects presented to the senses.

Section 1887 of the Code of Civil Procedure defines writings as of two kinds: 1. Public, and 2. private.

Public writings are defined by Section 1888 of the Code of Civil Procedure as follows:

“Public writings are:

1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;

2. Public records, kept in this state, of private writings.”

There can be no question but that the certificate of the Secretary of State, prescribed and set forth in Section 362b of the Civil Code, is a public writing.

Section 362b of the Civil Code does not specify that the evidence of compliance with the conditions necessary to adopt an amendment to the articles of incorporation cannot be controverted or that such evidence is conclusive, but it is substantive evidence and not a presumption or inference. Being evidence of a substantive nature we are faced with two situations: First—if there was no testimony contradicting the actual fact of the giving of notice of the intention to amend the articles of incorporation, then the court's finding to the effect that notice was given, cannot be set aside. This is the situation as we have pointed out in the earlier pages of this brief and as commented on by the court. Second—if there is any evidence in the record, which we contend there is not, to the effect that no notice was given, then all we have is a conflict in the evidence and a finding by the trial court in favor of appellees is conclusive.

We have read the case of *Ariasi v. Orient Insurance Co.*, 50 F. 2d 548, cited on page 21 of appellant's brief. This case dealt with presumptions and on that phase of the case held that a mere presumption was not evidence when weighed against positive evidence to the contrary. It was a case under the National Prohibition Act and in the instant case we are not dealing with a presumption nor are we dealing with any positive evidence of any kind showing that notice was not given of an intention to amend the articles of incorporation of the Ojai Mutual Water Company.

The Certificate of the Secretary of State of the Amendment of the Articles of Incorporation of the Ojai Mutual Water Company Is Proof of the Fact of Compliance Respecting the Giving of Notice.

A comparatively recent decision of the United States Court of Appeals, Ninth Circuit, namely, *Olender v. United States of America*, 210 F. 2d 795, holds that official documents are exceptions to the hearsay rule and are admissible as proof of the facts therein stated. We take the liberty of quoting from paragraphs 11 and 12 of the headnote in that case, as follows:

“For the purposes of applying the rule no difference has been recognized between documents of federal, state and county governments. (Citing cases.)

Generally stated, the rule is that all documents prepared by public officials pursuant to a duty imposed by law or required by the nature of their offices are admissible as proof of the facts stated therein. See *Greenbaum v. U. S.*, 9 Cir., 80 F. 2d 113, 126. The reason of the rule is that it would be burdensome and inconvenient to call public officials to appear in the myriad cases in which their testimony might be required in a court of law, and that records and reports prepared by such officials in the course of their duties are generally trustworthy. *Wong Wing Foo v. McGrath*, 9 Cir., 196 F. 2d 120; 5 *Wigmore on Evidence*, pp. 1631, 1632 (3rd ed.).”

There can be no question under Section 362b, Civil Code, but that the certificate of the Secretary of State referred to in that section constitutes an official public document.

We have checked the time element respecting Section 362b, 1933 Civil Code, with the Secretary of State and

for appellant's information find that the 50th session of the California legislature convened January 2, 1933, and adjourned January 28, 1933, both dates inclusive. The second session of the 1933 legislature convened February 28, 1933, and adjourned May 12, 1933, both dates inclusive. The third session of the regular session of the 1933 legislature convened July 17, 1933, and adjourned July 26, 1933, both dates inclusive. The 51st session of the 1935 legislature convened January 7, 1935, and adjourned January 26, 1935, both dates inclusive. The second half of the 51st session of the legislature convened March 4, 1935, and adjourned June 16, 1935, both dates inclusive. Section 362b, Civil Code, shows there was no amendment at the 1933 session of the legislature and if there had been any amendment subsequent to that time by the 51st session of the legislature it would not have been effective until September 16, 1935, or in other words, ninety days following the final adjournment of the 51st session. The amendment to the articles of incorporation of the Water Company having occurred March 4, 1935, Section 362b of the 1933 Civil Code was in effect at that time.

Appellant's Argument to the Effect That There Was No Recital in the Minutes of the Giving of Notice of the Amendment to the Articles Is Unsound.

Appellant makes a very brief allusion to the fact that there was no recital in the minutes that notice was given. This failure in nowise invalidates the minutes or is it any evidence that notice was in fact not given. The mere omission to insert in the minutes a recital to the effect that notice was given has no bearing on the alleged invalidity of the amendment to the articles. This is the rule in both the state and federal courts. In the case of *Bank of Napa v. Ferguson Burns Estate*, 48 Cal. App. 319

(1920), a case where the minutes had not been made up the court held on page 326, as follows:

“It is to be regretted, of course, that a more formal memorial of the proceedings was not preserved, but a record of the corporate acts and resolutions is not essential to their validity. (*Citizens Securities’ Co. v. Hammel*, 14 Cal. App. 564, 112 P. 731; *Boggs v. Lakeport etc.*, 111 C. 354, 43 P. 1106.)”

A reading of the case of *Central Trust Co. v. Southern Oil Corp.*, 8 F. 2d 338 (1925), indicates that the same rule obtains in the federal courts, quoting from page 346 of the opinion, where the court discussed the necessity of making up a record after the meeting, the court held as follows:

“The Inter-Ocean Company’s board of directors made up its records after the meeting authorizing the giving of the lease, but the board of directors of the Southern failed to make a record authorizing its acceptance. It, however did accept, took possession of and operated the leased plant. In doing so it gave its notes and pledged its bonds. The failure of its board to make a record, as it should have done, was not an indispensable requirement and did not render invalid and abortive all of these transactions.”

Whether Said Actions 14945 and 14946 Are Properly Pleaded Class Actions Does Not in Any Way Affect the Failure of Appellant to State a Claim Upon Which Relief Can Be Granted.

On pages 22 and 23 of his opening brief appellant cites authorities in support of the proposition that both cases are properly pleaded class actions. Whether they are or not does not relieve appellant from setting forth a claim upon which relief can be granted. Appellant cites a por-

tion of Rule 23, Federal Rules of Civil Procedure, on page 22 of his opening brief as justification for his so-called class or derivative suit. Appellant does not allege in his complaint, nor have appellees ever received any complaint of any kind or nature relative to the conduct and management of the affairs of the Ojai Mutual Water Company from the time of its organization.

Appellant entirely failed to set forth with particularity the efforts of appellant to secure from the managing director or trustees *and if necessary from the shareholders such action as he desires* (emphasis ours) and the reasons for his failure to obtain such action or the reason for not making such efforts. Appellant, however, states that he represents himself and the other shareholders. Taking him at his word he, of course, only represents those stockholders other than the appellee, The Ojai Valley Company and he seeks to excuse himself from a compliance with Rule 23 by contending that it would have been futile for him to have demanded of The Ojai Valley Company such action as he desired by reason of the fact that the appellee, Valley Company, is a majority stockholder. Therefore appellant must be representing the minority stockholders of the Ojai Mutual Water Company but he makes no allegation in his complaint that he has made any demand upon any of the minority shareholders to join with him or to take such action as he, appellant, desired. Appellees do not hesitate to assert that appellant could find no such stockholders to join him in any such action or produce any stockholder who could honestly claim or assert that he has been treated in a high-handed, arbitrary

or dishonest manner by appellees, or either of them. Appellees are confident that this is not a genuine class suit, irrespective of any of the allegations set forth in appellant's complaint. We quote that portion of Rule 23, Federal Rules of Civil Procedure, as follows:

"The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

We make the further observation that if appellant is excused from setting forth with particularity his efforts to secure from the managing director or trustees the action that he desired, then certainly it became necessary that he do so from the shareholders. His complaint contains no allegation to that effect.

The Fact That the District Court Sat as a Court of Equity Did Not Entitle Appellant to Have His Case Heard When No Valid Claim Upon Which Relief Could Be Granted Had Been Alleged.

On pages 24 and 25 of appellant's opening brief he refers to certain equitable principles about equity once having assumed jurisdiction will retain it to the end in order to award complete relief. There is no question involved in this case relative to general principles of equity but as we have already, and will hereafter point out, there was no claim before the court upon which the court would be justified in granting relief, except as to the question of the amendment of the articles of incorporation, and upon that issue the court took testimony and found against the appellant.

Appellant's Complaints Do Not State Claims Upon Which Relief Can Be Granted.

On pages 25, 26, 27 and 28 of appellant's opening brief certain authorities are cited relative to the fiduciary character of a majority stockholder or officer or a director of a corporation and that he may put himself in a position of trust with relation to minority stockholders and that where the fiduciary relationship exists the acts and conduct of such majority stockholder will be carefully scrutinized. It is true that under proper circumstances the court will disregard the corporate entity where fraud and bad faith are present and appellant makes the further argument that it wouldn't have made any difference if notice of the amendment to the articles of incorporation had been given because at the time of the amendment on March 4, 1935, the appellee, The Ojai Valley Company owned a majority stock interest in the Ojai Mutual Water Company, but appellant completely overlooks the fact that there was nothing relative to the amendment that in any way added to or made more certain the majority control of the Ojai Valley Company with respect to this stock. The service area of the corporation, as set forth in the articles contains 2,675 acres of land. The reasons for the amendment were alleged and set forth in appellees' answer under the further separate and sixth defense and answer to plaintiff's complaint. [Tr. Rec. V. 1, pp. 69-79.] The substance of this defense is that the articles were amended to provide one share per acre of land, or fraction thereof, rather than four shares per acre, by reason of the heavy increase in population on the Ojai area and that many persons, firms and corporations had purchased land in the area exclusive of land owned or held by the appellees and that in order to give the stock a wider spread and to accommodate more purchasers and

water users, further that many purchasers of water stock on the basis of one share per acre had constructed valuable and extensive improvements, agricultural, commercial, industrial and otherwise, within the service area, all with the full knowledge and acquiescence on the part of appellant, and that appellee, Ojai Mutual Water Company, was compelled to and has expended large sums of money to construct, maintain and repair the necessary facilities required by and under its original and amended articles of incorporation, to furnish water service to qualified persons, firms and corporations within the service area.

Both of Appellant's Complaints Are in the Same Category Insofar as Failing to State a Claim Upon Which Relief Can Be Granted.

Appellant waited until shortly before case No. 14945 was to go to trial and then filed case No. 14946, setting up the same exhibits to case No. 14946 as those set up in case No. 14945, and the two cases were finally consolidated for trial. The same situation exists in case No. 14946 relative to the appellant's contention that only those are entitled to water who derived title to their lands from the so-called Libbey interests and the same arguments relative to the court's action in dismissing case No. 14945 for failure to state a claim upon which relief can be granted, are applicable to case No. 14946.

Appellant's Own Complaint Shows That He Owned Stock in the Ojai Mutual Water Company, Both Before and After the Amendment of March 4, 1935.

As late as May 21, 1945, appellant purchased 20.82 acres of land within the service area of the water company and received Certificate No. 195 for 20 shares of the capital stock of Ojai Mutual Water Company. [Tr. Rec. V. 1, pp. 7-8.] This last acquisition of water stock by

appellant occurred more than ten years after the March 4, 1935, amendment to the articles of incorporation and appellant has received and accepted water service from the water company on the basis of one share per acre on the land purchase last referred to, without any objection, and this situation continued up to the time of the filing of the original complaint on June 12, 1951.

Appellant's Argument on Fraud, Dishonesty, Overreaching and Breach of Fiduciary Duty Is a Perfect Example of Ignoring the Real Situation Set Forth in His Complaint.

Appellant's tactics in this regard remind one of shooting shrapnel or a spray nozzle technique, hoping that something might be struck by a stray bullet or some bit of spray reach its target.

We ask the Court—how could there be any dishonesty, fraud or breach of fiduciary duty by reason of the amendment of the articles of incorporation? Who was prejudiced thereby? Who was deprived of any rights in or to his property in the service area or his stock in the Ojai Mutual Water Company? It was an ordinary and prudent thing to do from the standpoint of affording to the greatest number within the service area the right to purchase stock and receive water. Under the original articles it would have taken four times as much stock to accomplish this purpose as under the March 4, 1935, amendment. It created a situation where in order to meet increasing demands of new residents within the area a solution was required in order to issue stock without the issuance of new or additional stock over that which had been originally authorized. Yet appellant sees in this situation fraud, breach of fiduciary duty and overreaching. As heretofore pointed out in this brief the only attack leveled on the amendment by appellant is that of lack of notice. Yet he

is endeavoring to twist and turn the admitted facts set forth in his pleadings into a situation entirely different from the realities of the case in order to accomplish his purpose, namely, the cancellation of the stock owned by the appellee, The Ojai Valley Company.

Appellant accepted 20 shares of stock on the basis of one share per acre ten years after the amendment and six years before he filed his lawsuit. He is bound by the allegations of his complaint but the appellees are not bound by his reckless statements and unfounded charges of fraud, breach of fiduciary duty, etc.

It was one thing for appellant to indulge himself in his opening brief by asserting lofty principles of equity when he himself is waging a campaign against the appellees to deprive them of their valuable property rights which they have owned and held for over thirty years and administered in a just and fair manner since their organization as corporate entities. Some psychologist might define this as an example of defense mechanism on the part of appellant by charging fraud, dishonesty and breach of fiduciary duty against the appellees, when as a matter of fact his own conduct should be as carefully scrutinized as he wants the court to scrutinize the conduct of appellees.

We have checked the cases cited on pages 25, 26, 27 and 28 of appellant's opening brief and can find no basis to criticize any of them in so far as the law announced in those cases relate to the facts upon which the respective decisions were based. The case of *Subin v. Goldsmith*, 224 F. 2d 753, was a case where the plaintiff sought an injunction against the defendant company and its directors from holding a stockholders' meeting to approve a contract for the purchase of certain assets of Diamond Hosiery Corp. This was a derivative action under Fed-

eral Rules of Civil Procedure, Rule 23(b) (28 U. S. C. A.) Under the facts of the *Subin* case the court held it was a properly brought derivative action, but we are unable to follow appellant's contention that the *Subin* case is an authority in anywise controlling in the instant case. The facts out of which that litigation arose are entirely at variance with any of the facts before the court in the case at bar.

Perlman v. Feldman, 219 F. 2d 173, cited on page 27 of appellant's opening brief, was a derivative action brought by minority stockholders of Newport Steel Corp. to compel an accounting for alleged illegal gains accruing to defendants as a result of the sale of their controlling interest in the corporation. One, Feldmann, was a dominant stockholder. The question of the fiduciary duty, trust relations, etc. arose in the *Feldmann* case. We have no such situation in the case at bar. Appellant's complaint does not allege that there has been any sale or any threatened sale by the Ojai Valley Company of its stock en bloc or otherwise, or in what respects, if any, the Ojai Valley Company has breached or violated any alleged fiduciary duty resting on it. Water service can only be extended to those who own land within the service area described and set forth in the articles of incorporation. The service area of the water company includes a substantial portion of the incorporated City of Ojai and lands adjacent and adjoining thereto, most of which are residential and users of domestic water only. It is more than unlikely that anyone is going to purchase the majority of the stock of the Ojai Mutual Water Company without having lands to put it on, but it is highly probable that new home owners going into the area will be desirous of purchasing a share of water company stock to obtain water for their homes or

residences, most of which are on lots not larger than one or two acres in size.

Another case cited by appellant on page 28 of his opening brief is *Judelson v. American Metal Bearing Company*, 89 Cal. App. 2d 256. It was there held that the complaint must allege and it must be shown that the organization of the corporation is in some manner fraudulent or prompted by dishonesty or that the corporation committed or intended to commit a fraud or that injury will be done if the corporate entity is not disregarded. There is no allegation in appellant's complaint that either of the appellee corporation were fraudulently organized or that such organization was prompted by dishonesty or that either appellee committed or intended to commit a fraud. The citing of this case by appellant is another example of his attempt to cite the law of some other case or cases to fit into the facts of his own case where there is no factual basis existent for so doing.

**Appellant's Argument Under the First Cause of Action
That the Amendment Is Void Is Unfounded.**

On pages 29 and 30 of his opening brief the appellant again returns to his contention that the amendment to the articles is void and not voidable. We feel appellees have completely answered this argument in the earlier pages of this brief, but desire to answer every contention made by appellant, whether the argument is new or a reiteration. He cites *McDermont v. Anaheim Union Water Company*, 124 Cal. 112, on page 29 of his opening brief. In the *McDermont* case the amendment to the articles included additional lands and alleged that the amendment was adopted and filed by the directors without the consent of the authority of two-thirds of the subscribed capital stock and without the required publication of notice of intention

to amend the articles. In the instant case no such situation existed. At the meeting amending the articles of incorporation of the Ojai Mutual Water Company out of a total of 2,000 shares of stock issued and outstanding there were 1,740 shares represented at the meeting. [Tr. Rec. V. 1, pp. 35-36.] We do not think it necessary to again take up the argument on the giving of notice which we have set forth in the earlier pages of this brief.

In *Boswell v. Mt. Jupiter Mutual Water Co.*, 97 Cal. App. 2d 437, cited by appellant on page 29 of his opening brief, the questions involved were call and notice of special meetings of the stockholders and of meetings of directors relative to the levying of assessments. There was no question in the *Boswell* case but that a defective assessment had been levied where out of a total of 631 shares outstanding only 154 of the stockholders had been notified.

In citing these cases appellant simply proceeds upon the assumption that no notice was given of the amendment of the articles of Ojai Mutual Water Company when his proof on that issue entirely failed to support his contention.

Lindsay-Strathmore Irrig. Dist. v. Wutchumna Water Company, 111 Cal. App. 688, cited on page 29 of appellant's opening brief, is a case where it was held that under the Irrigation District Act mandamus is a proper remedy where a stockholder in a mutual water company is denied his proportionate share of the water.

Appellant's further contention on page 29 of his opening brief that the "essential purpose" of the water company were subverted by what appellant refers to as the "void amendment" is completely answered by the fact that the service area to which the Ojai Mutual Water Company

can furnish water, namely 2,675 acres as set forth and described in the articles of incorporation attached as Exhibit "A" to appellant's complaint, completely negatives that argument and also the argument of appellant that only those purchasing lands from the so-called Libbey interests are entitled to water from the Ojai Mutual Water Company.

The citation of *Mound Water Company v. Southern California Edison Company*, 184 Cal. 602, on page 29 of appellant's opening brief merely is authority for the proposition that a mutual water company is not a public utility and that under the factual situation of that case where certain lands were acquired by landowners with the understanding that water was to be distributed to their lands for their use would have an entirely different background than that in the instant case. The articles of incorporation of the Mound Water Company were in no wise similar to those of the Ojai Mutual Water Company and as we will point out hereafter there is no uniformity existing in California respecting the set-up of mutual water companies. They are organized under various and different plans.

The argument of appellant to the effect that the void amendment of the articles has resulted in the loss of control to the users of the water is an argument that we cannot follow. When appellee's stock is finally disposed of the 1935 amendment to the articles of the Mutual Water Company will result in a greater and wider spread of this stock among water users within the service area of the Water Company as defined and set forth in its articles of incorporation rather than would have been the case had the articles not been amended.

Appellant, however, is attempting to cancel the stock owned by appellee, The Ojai Valley Company, and deprive it of a property right to which it is as much entitled to protection of the law as that of appellant.

There Has Been No Breach or Any Threatened Future Breach of Any Agreement Between Appellees and Their Stockholders.

On page 30 of his opening brief under the second cause of action appellant again draws on his imagination in stating that there has been a breach, or threatened future breach between appellees and their stockholders of the agreement not to furnish water to any but the so-called Libbey lands. There is no such allegation in appellant's complaint, for as we have previously pointed out the articles of incorporation attached thereto as Exhibit "A" [Tr. Rec. V. 1, pp. 26-33] completely refute this statement on the part of appellant. Appellant is as familiar as the appellees are, with the fact that the service area described in the articles of incorporation embrace 2,675 acres. This is a comparatively small acreage when measured against the original acreage in the area once owned by Edward D. Libbey. *There is no allegation in appellant's complaint to the effect that appellees have ever delivered water to anyone outside the service area, or to non-stockholders, or to those who are not entitled to water service or that they have ever threatened to do so in the future.* The understanding and agreement referred to by appellant on page 30 of his brief, is, we again assert, purely the child of his imagination.

The citation on page 31 of appellant's opening brief of *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, is, as appellees view it, a case supporting their position in the case before the court. The appellant Lucking has been receiv-

ing water from the water company under what he has felt free to condemn as the "void 1935 amendment to the articles" since 1945 as hereinabove set forth in this brief. Having had the water delivered to him and having accepted the water and having observed the acts of appellees in furnishing water in the service area described in the articles of incorporation, the appellant should not now be heard to deny acquiescence and acceptance by him of water for a period of years.

A reading of *Empire West Side Irrigation District v. Stratford Irrigation District*, 10 Cal. 2d 376, cited by appellant on page 31 of his opening brief, we submit is an authority in favor of appellees' position to the effect that that appellant in this case is chargeable with laches. We quote from page 382 of that opinion, as follows:

"In addition, we are satisfied that there is ample evidence to support the lower court's finding that the appellants are chargeable with laches in the prosecution of the claim or asserted right relied on herein. As already stated, the contract between the land and water companies was executed January 8, 1906. The testimony of some of the appellants' own witnesses indicates that since that time there has been a continual controversy between the west and east side landowners over the Lemoore water, the former making yearly demands therefor. One of the appellants' witnesses testified that the east side landowners denied that the west side landowners had any right to the Lemoore water. This evidence, coupled with the inactivity of the west side landowners from the time of the order of the railroad commission in the Ferrasci case (1915) purporting to award said Lemoore water to the east side landowners, whether *res judicata* or not, discloses an inexcusable apathy and tardiness of the appellants in the prosecution of any claim

or right they may have had under the 1906 contract, in and to the Lemoore water and supports the finding of laches made against them. It must be concluded that by the commencement of this action on December 21, 1934, the appellants were seeking to prosecute, at best, a stale claim."

The appellant Lucking finds himself in the very same position on the question of laches as did the appellant in the *Empire* case (*supra*). The appellant's complaint on its face shows that he accepted 20 shares of stock of the water company on his last purchase of land in 1945. [Tr. Rec. V. 1, pp. 7-8.] If the amendment to the articles of incorporation of the Water Company was void in 1935, it still must have been in that condition in 1945 when appellant acquiesced in taking one share of water stock per acre of land, and insofar as equity is concerned he has been guilty of either laches, waiver, acquiescence or estoppel to now deny the validity of the amendment.

Appellees in Their Answer Pleaded Sections 337, 339 and 343, California Code of Civil Procedure, Namely, the Statute of Limitations Sections.

On appellant's theory of a breach of contract, set forth in his brief, if the contract were in writing, it would be barred by Section 337, Code of Civil Procedure, within four years of the date of the breach. The breach, as we see it, under appellant's theory, occurred on March 4, 1935, when the so-called void amendment was adopted. The complaint was filed June 20, 1951. Under Section 337, Code of Civil Procedure, the statute of limitations had run four times over.

Section 339, Code of Civil Procedure, provides a three-year period for any action upon a liability created by statute, other than a penalty or forfeiture or for a tres-

pass or injury to real property or for relief on the ground of fraud or mistake. Any view that is taken of the situation, even including the allegations of fraud and mistake, where appellant waited more than three years after discovering the facts out of which the alleged fraud or mistake arose, he certainly cannot deny the fact that he must have known of it as early as his last purchase of land in 1945 when he received one share of stock per acre of land so as to obtain water service thereon, but he waited approximately six years after the 1945 purchase before filing his complaint.

Section 343, Code of Civil Procedure, reads as follows:

“An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.”

Even under this section appellant waited more than four years after the 1945 purchase of land, on the one share per acre basis, before instituting his action.

Irrespective of appellant's contentions set forth in his brief his complaint is clearly and plainly barred by the provisions of Sections 337, 339 and 343, Code of Civil Procedure, or any or all of them. He seeks to avoid the statute of limitations by contending and arguing that only those who derive title from the so-called Libbey interests are entitled to water and that this is a continuing situation. This phase of the case is completely answered by the articles of incorporation and by-laws of the Water Company which we have heretofore discussed in detail.

Appellant's Contention That Appellees Have Been Guilty of Inequitable, Autocratic and Arbitrary Acts and Actions Is Groundless.

On page 32 of appellant's opening brief, as to his so-called fourth cause of action, appellant again feels free to charge all varieties of misconduct against appellees. Appellant's statement that the appellees, Ojai Valley Company, has made the grantees' lands and homes decrease in value, is as appellant knows, contrary to the truth and it is difficult to follow appellant's argument that the users of water have been deprived of the control of the Mutual Water Company. This idea, of course, must have been generated by appellant's false conception to the effect that no one but purchasers of land from the so-called Libbey interests are entitled to water service from the Water Company. Appellant seems to be greatly concerned over the fact that the appellee is in a position to make a profit on the sale of its shares of stock. Appellant, of course, knows better than this, for the simple reason that he is familiar with all the ramifications, records, articles of incorporation and by-laws of the Water Company and has had free access to them at any time he so desired. [See Harmon's testimony, Tr. Rec. V, 2, p. 257.] All lands in the area under discussion have increased in value by reason of the increase in population and development within the area and appellant has had as much benefit from this increase in value as have others within the service area of the Water Company.

Under the Articles of Incorporation of the Ojai Mutual Water Company the Shares of Stock Are Not Appurtenant to the Land.

Appellant's argument under the fifth and sixth causes of action on pages 33-41 of his opening brief is based upon the erroneous contention that the stock of the Ojai Mutual Water Company is appurtenant to the land of its stockholders. Here again is a plain situation of a contention made by appellant contrary to his own pleading. Exhibit "A" of the articles of incorporation of Ojai Mutual Water Company [Tr. Rec. V. 1, pp. 26-33], clearly provide that the shares of stock are not appurtenant. To settle this argument we first turn to the appropriate language of the articles of incorporation of the Ojai Mutual Water Company found on page 30, Volume 1, Transcript of Record, as follows:

"Provided that any stockholder desiring to use and using said water shall be the owner of one share of the capital stock of the company for each one-quarter acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the Bylaws of the company may determine. *Mere ownership of stock in said company or of land situated within the above-described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible.*" (Emphasis ours.)

A similar provision is found in the By-laws.

The only change in the amendment to the articles of incorporation require that a stockholder desiring to use and using said water shall be the owner of one share of the capital stock of the company for each acre of land, or fraction thereof, which is found on page 38, Volume 1 of Transcript of Record, as follows:

“Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof. . . .”

It is clear that one can own stock in the water company without owning land in the service area and one can own land in the service area and not own stock in the water company, but no one, under the Articles or By-laws of the Water Company, can receive water service from the Ojai Mutual Water Company unless such person owns land in the service area and stock in the Ojai Mutual Water Company. It was the clear intent of the organizers of the corporation to make the stock non-appurtenant. This was done as legally authorized by the Civil Code sections pertaining to the subject.

**Where Stock Is Not Appurtenant to Land It Is Considered
as Intangible Personal Property.**

Where stock is not appurtenant, as in the instant case, the ordinary rule of transfer of stock as specified in Section 330.1 of the Civil Code applies. See *Palo Verde Land & Water Co. v. Edwards*, 82 Cal. App. 52.

On the other hand where the water stock is appurtenant to the land, under the Water Transfer Law (Stats. 1923, Chap. 377, p. 757); Deering's General Laws, Act 9113, it was held that a purchaser of land is entitled to have a new certificate issued in his name upon exhibiting to the

secretary of the water company of a duly recorded deed to the land to which the stock is appurtenant. The Civil Code sections here referred to are the 1933 Civil Code sections in effect at the time of the amendment of the articles of incorporation of the Water Company.

A leading California case on the subject of whether or not stock in a mutual water company is appurtenant or non-appurtenant is *Palos Verde Land & Water Co. v. Edwards* (1927), 82 Cal. App. 52. In that case the plaintiff water company sued to quiet title to some 80 shares of stock of the corporation to which it claimed title by virtue of a pledge by the original owner. The facts were that the plaintiff sold the stock in December, 1913, and certain land to which it referred, to one Bodkin, who in turn mortgaged his land and pledged the stock. He defaulted under the mortgage. Defendant Edwards subsequently became the owner of the land. The plaintiff water company claimed under the pledge. Edwards claimed that the water stock was an interest in real property and that under Section 2986 of the Civil Code that the pledge was an attempt to pledge real property under a pledge agreement and that such a conveyance or attempted conveyance was void. The sole question to be determined on appeal was whether or not the stock was appurtenant or non-appurtenant to the land. The trial court held that it was not appurtenant and gave judgment quieting title in the plaintiff. The judgment was affirmed on appeal. The court, in its decision, in referring to Section 324, Civil Code, used the following language, on page 57 of the opinion:

“Section 324 of the Civil Code predicates the attributes of personal property to shares of stock in a water company and that such shares remain personal

property unless the corporation shall adopt and record in the office of the County Recorder a by-law that the stock shall be appurtenant to the land. It would seem, therefore, that unless such a by-law be adopted the stock must remain personal property and not become appurtenant to the land. In *Security Commercial Savings Bank of El Centro v. Imperial Water Co.*, 183 Cal. 488 (192 Pac. 22) the court intimates that stock might become appurtenant to the land without recording the by-law, but did not expressly so hold. It did not, however, intimate that stock might become appurtenant to the land without the adoption of a by-law to that effect. There is no provision in the by-laws to the effect that the water stock shall be appurtenant to the land, and of course, there being no by-law to that effect none was or can be recorded. Nor is there any evidence in the record showing that the Water Company by its acts or practices held the water stock to be appurtenant to the land upon which it is located. On the contrary, it is the uncontradicted evidence of Mr. P. R. Asmussen, auditor and assistant secretary of the company, that the company did not require evidence of title to the land in making a transfer of the stock. The company transferred the stock upon surrender of properly endorsed certificates of stock, and in making transfers of stock it was not the policy or practice of the company to require evidences of transfers of the lands to the parties to whom the certificates were to be transferred. When a deed has been presented showing a transfer of the land, the company would not transfer the stock to the grantee in the deed but only upon surrender of the original stock certificate properly endorsed, and quite frequently stock has been moved from one location to another, with the consent of the board of directors, when the certificate of stock has been surrendered property endorsed."

The court also, in commenting on the provisions of the articles of incorporation and by-laws in the *Edwards* case, used the following language, on page 59 of the opinion:

“There are no such provisions in the articles of incorporation or by-laws in the instant case. The only provisions to be considered here are in effect: that water shall be distributed only to lands upon which has been located; that stock shall be located only upon lands owned or claimed by the purchaser and that the certificate shall contain a description of the land on which the shares are located.

There is certainly nothing in any of these provisions which would prevent the transfer of the water stock to other lands or which would give to the words ‘location’ or ‘located’ the meaning of ‘appurtenant’ or which would give to the shares of stock the fixed character of real property, contrary to the general provision of the law defining the character of shares of stock of a corporation as personal property.”

Again on page 61 of the opinion in the above case, referring to Section 324 of the Civil Code, the Court held:

“Section 324 of the Civil Code as amended in 1895 was in force at the time of the incorporation of the respondent company, it being incorporated in 1908, and it would seem that if it were the intention of the incorporators that the stock should be appurtenant to the land they would have so provided in their by-laws and complied with the section relative to recording and thus made the stock appurtenant to the land, which the trial court found not to be appurtenant, and which we think is the correct view.”

Palo Verde, etc. v. Edwards (supra), appellees respectfully submit definitely settles the argument of appellant to the effect that the stock in the Ojai Mutual Water Com-

pany is appurtenant. The articles and by-laws of the Ojai Mutual Water Company, as we have pointed out, and the settled authorities on the subject, are to the contrary.

Appellant's Contention That Because the Right to Receive Water Is in the Nature of Real Property Does Not Make Stock in a Mutual Water Company Appurtenant to the Land.

On this point we quote the case of *Wheat v. Thomas* (1930), 209 Cal. 306, quoting from page 315, of the opinion, as follows:

"The right of a stockholder in a mutual water company to receive water by virtue of his ownership of stock is real property but the shares themselves are personalty and do not pass upon a conveyance of land unless they are appurtenant thereto; they may become appurtenant by the adoption of appropriate provisions in the by-laws of the water company under section 324 of the Civil Code, but one claiming that they are appurtenant, is required to prove it. (See 26 Cal. Jur. 449 *et seq.*, and cases in note; also *Imperial Water Co. v. Meserve*, 62 Cal. App. 593 (217 Pac. 548) and *Palo Verde, etc. Co. v. Edwards*, 82 Cal. App. 52 (254 Pac. 922).)"

Mutual Water Companies Do Not Follow a Uniform Pattern in Their Organization.

In the earlier pages of this brief we commented to the effect that mutual water companies are not organized pursuant to any set plan. Their organizations depend greatly upon the nature of the water supply, the quantity of water available, the number of its shareholders and the nature of its corporate interest in the title of the water to be supplied.

The most common form of organization is where the stockholders are issued one or more shares of stock for each acre of land which is owned in the distribution system. See *Curtin v. Arroyo Ditch Company*, 147 Cal. 337. Under such a set-up the stock may or may not be appurtenant to specific land. See *Gordon v. Covina Irrigation Co.*, 164 Cal. 88. The plan is generally best adapted to situations where the land embraced within the service area is definitely fixed in advance, for in this way the purchaser can be more certain of the amount of water that his shares will represent from year to year.

The Ojai Mutual Water Company, as can readily be seen by its articles of incorporation was organized to fit the needs of the particular area described in its articles of incorporation. As above pointed out there are 2,675 acres in the service area and a total stock issue of 2,003 shares, the 3 odd shares being qualifying directors' shares. Anyone purchasing stock in the Ojai Mutual Water Company is assured that water will not be delivered outside of the service area; that the stock is not appurtenant to the land and that stockholders, whether or not they own land at the time of the purchase of stock, will be subsequently entitled to water service if they purchase land in the service area, and they are free to sell that land if they so desire and still retain their stock in the water company and if they buy other land in the service area they would still be entitled to water service by reason of their stock ownership. There is nothing unusual in this set-up except that appellant has tried to add something to it, namely, that no one is entitled to receive water within the service area unless they have purchased land from the so-called Libbey interests. In the earlier pages of this brief we have pointed out to the court that such is absolutely not the case.

**The Relation Between the Stockholders and the Corporation
Is One of Contract.**

We have frequently called the court's attention to the articles of incorporation of the Ojai Mutual Water Company [Tr. Rec. V. 1, pp. 26-33] and have stated that the appellant is bound by the articles and the by-laws on the fundamental legal proposition that the relation between the corporation and the stockholders is one of contract, in which the articles of incorporation, by-laws and pertinent statutes of the state are embodied and measure the rights of the shareholders between themselves and the corporation. In this respect we quote a leading case on the subject, *Schroeter v. Bartlett Syndicate Bldg. Corp. Ltd.* (1936), 8 Cal. 2d 12, quoting from page 14 as follows:

“Appellant cites the settled rule that the relation existing between a corporation and its stockholders, is one of contract in which the charter, articles of incorporation, by-laws of the corporation and pertinent statutes of the state are embodied (*Shattuck & Desmond Whse. Co. v. Gillelen*, 154 Cal. 778, 783 (99 Pac. 348). . . .

“The fallacy in this reasoning is that it does not take into consideration section 1 of article XII of the California Constitution, which reads: ‘Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in the state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed.’ This provision was also a part of the contract between the corporation and its stockholders. (Citing cases.)”

The Ojai Mutual Water Company's Water Supply Has at All Times Been Adequate and Has Been Increasing Rather Than Decreasing.

The appellant starts off on page 33 of his opening brief by stating that the Ojai Mutual Water Company is an appropriator of water and that such rights can only be acquired by putting water to a beneficial use. There is no allegation in appellant's complaint to the effect that the water company has ever made other than a beneficial use of its water. This was the situation at the time that appellant filed his complaint and he endeavored to obtain admissions under Rule 36, Federal Rules of Civil Procedure, to have appellees admit that there was a critical water shortage. [Tr. Rec. V. 1, pp. 110-111.]

In truth and in fact never at any time since its organization in 1920 has the Water Company been unable to furnish water to its stockholders nor has any situation ever arisen where it has been necessary to ration water or to curtail the service of water. As appellant well knows there has been a marked substantial increase in water service by the Water Company within the service area as defined in its articles of incorporation. New homes have been constructed and purchasers are buying stock in the Water Company for water service and the so-called critical water shortage thought up by appellant is of course based on his theory that there is only enough water for those purchasing lands from the so-called Libbey interests, all of which we have heretofore pointed out is untenable. There has been a substantial increase in the water supply in the area where the water company's wells are located by reason of water delivered to the area from the Matilija Dam and the water level in the water company's wells has risen instead of lowered, despite the increased demand

for the water. Some of the very first users of this water did not acquire title to their lands from the so-called Libbey interests and a substantial number of stockholders and water users in the service area do not derive their titles through the so-called Libbey interests, a fact well known to appellant, yet appellant boldly asserts, contrary to the facts, and contrary to the articles, that only those who obtain title from the Libbey interests are entitled to receive water from the Water Company.

Another glaring defect in appellant's position is that in asserting that he represents the stockholders of the Ojai Mutual Water Company in a class or derivative action that he must of necessity be representing stockholders in the water company, some of whom acquire title from the so-called Libbey interests *and others who did not acquire their titles from the so-called Libbey interests*. We do not know what will be the position of the stockholders who did not acquire lands from the so-called Libbey interests when and if ever they become aware of the fact that appellant contends he represents them in a class or derivative suit, for if appellant is successful in his contention then a large group of stockholders will be denied water service who did not acquire title from the so-called Libbey interests.

In the First Instance Whether the Water Company Is or Is Not an Appropriator of Water Is Outside the Issues and Has No Real Bearing on the Merits of This Appeal.

As appellant well knows there is a wide diversity of opinion as to where the watershed lies within which the Water Company's wells are located or how extensive are the underground waters within the area, sometimes referred to as the Ojai basin or whether or not the Ojai basin is a true geological basin or merely referred to as

such for purposes of identification. It would require a geological study to determine these factors. Appellant is in no more a position than are appellees to claim or assert that the only water rights enjoyed by the Ojai Mutual Water Company are rights by appropriation, or are those which, in whole or in part, attach to an overlying landowner or a riparian owner. In any and all events appellant's contention respecting water comes back to his untenable proposition that only those are entitled to water within the service area who derived title from the so-called Libbey interests.

Appellant on page 35 of his opening brief cites *Pacific States Savings and Loan Corporation v. Schmitt*, 103 F. 2d 1002, and *Twin Falls Land and Water Company*, 79 F. 2d 431, as authority for the proposition that the shares of stock in the Ojai Mutual Water Company are appurtenant to the land. Those cases were decided under an entirely different set of facts and statutory provisions and do not apply to the instant case. We feel the argument on the question of appurtenancy or non-appurtenancy of the Ojai Mutual Water Company stock to the land has been completely covered in the earlier pages of this brief.

**Appellant's Contentions Under the Sixth Cause of Action
Are a Reiteration of His Argument on the Appurtenance
of the Water Stock to the Land Which It Serves With
Water.**

On pages 36 and 37 of appellant's opening brief he again comes back to the proposition that the stock in the Water Company is appurtenant. We again refer the court to the earlier pages of this brief on the proposition that the stock is not appurtenant to the land. Appellant, in citing *Smith v. Hallwood*, 67 Cal. App. 777, on this subject, failed to point out to the court the language on page 782, where the court squarely held that the stock was not made

appurtenant under the provisions of the amended by-laws and those of Section 324, Civil Code, using the following language:

“Clearly the Smith stock was not made appurtenant to any of his lands under the provisions of the amended by-laws and those of section 324 of the Civil Code. Appellants contend that they have acquired a right to the continued use of water under the provisions of section 552 of the Civil Code. That section is not applicable, however, because it is limited to ‘any corporation’ which ‘furnishes water to irrigate lands which said corporation has sold.’ The defendant has sold no lands. Whether or not, then, Smith’s stock became appurtenant to his land was a question of fact to be determined by the trial court from the acts of himself and the defendant and the manner in which water was furnished and used upon the Smith lands and those of other stockholders. (Estate of Thomas, 147 Cal. 236, 81 Pac. 539; Wiel on Water Rights, 3d ed., sec. 550.) It cannot be said that the evidence is insufficient to justify the court in finding as a fact that the Smith stock did not become appurtenant to the lands of plaintiffs. It follows that such stock is personal property, and therefore, did not pass to plaintiffs by the mere conveyance to them of their lands.”

Appellant cites *Franscioni v. Soledad Land & Water Co.*, 170 Cal. 221, on page 36 of his opening brief and as we read that case it is not authority for appellant’s contention that the shares of stock in the instant case are appurtenant to the land. It was merely held in the *Franscioni* case that the defendant was a public service water company and the plaintiff was entitled to water therefrom for irrigation on his lots by paying the rates established by law. We are unable to appreciate the application of that case to the case at bar.

Appellant's Attempt to Bring the Instant Case Within the Provisions of the Carey Act, Cannot Be Sustained.

On pages 37 to 41, inclusive, of his opening brief appellant contends that cases arising out of the Carey Act (43 U. S. C. A., Sec. 641) Chapter 14, entitled "Grant of Desert Land to State for Reclamation," are applicable to the case at bar. With this contention we cannot agree. A reading of appellant's citations on this subject again brings us back to appellant's fundamental contention, namely, that no water can be delivered to anyone except those who have obtained their lands from the so-called Libbey interests, thus entirely ignoring a large block of stockholders who are receiving water and who did not acquire title from the so-called Libbey interests.

We are not going to burden the court with the relation existing between parties holding land under an act of Congress known as the Carey Act. Under the Carey Act the Secretary of the Interior, as we understand it, is empowered to adopt certain rules and regulations for the reclamation, settlement and entry of certain arid public lands and to prescribe the form of contract between the United States and the States in carrying out the provisions, objects and purposes of the Carey Act. All such contracts are to be read together in connection with the standard imposed by the acts of Congress and the statutes of the States to which they refer. See *Carter v. Blaine County Investment Co.*, 45 F. 2d 643, cited on page 37 of appellant's opening brief. We quote from page 645 of that opinion, as follows:

“The basic question in this litigation is the relation of the parties to and under the act of Congress, known as the Carey Act, which authorized the Secretary of the Interior to contract with the state of Idaho for the reclamation of arid public lands of the United States, and for the settlement thereof by actual settlers. 43 USCA pp. 641-648. The Secretary of the Interior, pursuant to the act, adopted certain regulations for the reclamation, settlement and entry of public lands and prescribed the form of contract between the United States and the states in carrying out the purpose of the act. After the contract between the government and the state was entered into, contracts between the state and the construction company and between the construction company and the settlers were entered into, which are subject to the provisions of the said act and the regulations prescribed by the Secretary. These contracts are to be read together in connection with, and the standard imposed by, the acts of Congress and the statutes of the state to which they refer. Such statutory provisions are a part of the contracts, and are to be read into them, and, when the act of Congress is considered in this light, and its requirements which are at the foundation of such a project, a federal question arising under the laws of the United States is presented.”

We humbly submit that no such situation exists in the instant case. Neither appellee, nor their stockholders are settlers of reclaimed, arid land under the Carey Act, nor has the Secretary of the Interior any control over the lands involved in the instant case.

**Water Under the Carey Act Is Devoted to Public Use
Subject to Public Control.**

Under California law the waters of a mutual water company is not devoted to public use nor subject to public control. This is another sharp distinction existing between cases cited under the Carey Act on pages 38 and 39 of appellant's opening brief and the California cases on the subject. In the earlier case of *McFadden v. County of Los Angeles* (1888), 74 Cal. 571, quoting from the syllabus of the opinion, which we submit clearly states the law, the court held as follows:

"A corporation organized for the purpose of supplying water for the use of the owners and occupants of land within a particular district may adopt by-laws limiting the right to use the waters of the corporation exclusively to its own stockholders on lands owned by them."

"The board of supervisors of a county have no power, either under section 1 of article 14 of the constitution or the act of March 12, 1885, to fix the water rates of a corporation which acquires and holds water solely for the use of its stockholders, and not for sale, distribution, or rental to the general public and which does not sell, rent, or use its water in any way so as to accumulate a fund for the payment of dividends."

"A stockholder of a corporation is bound by its articles of incorporation and its duly and regularly adopted bylaws, whether he has signed them or not."

See, also:

Mound Water Company v. Southern California Edison Company, 184 Cal. 602 (*supra*).

Conclusion.

Appellant's Contention That the Ojai Mutual Water Company Was Formed for the Purpose of Supplying Water to the Lands of Mr. and Mrs. Edward D. Libbey, Referred to as the So-called Libbey Interests, Is Purely Fiction.

1. The articles of incorporation of the Water Company and the amendment thereto completely refute this contention.

2. From the date of its incorporation, up to the present, stock in the Water Company has been purchased by those living in the service area described in the articles of incorporation who did not acquire their lands from the so-called Libbey interests. These stockholders have been receiving water on the same basis as those acquiring title to their lands from the so-called Libbey interests.

3. The argument that the amendment to the articles of incorporation was for the purpose of insuring control in the Valley Company is fallacious. The articles were amended for the sole purpose of giving a wider spread to stockholders within the service area on account of the increase in population and demand for water. This obviated to some extent the necessity of issuing new stock to take care of new water users within the service area.

4. At no time in the history of the entire transaction did the so-called Libbey interests, or the Valley Company, ever own a majority of the acreage within the service area. The fact that the Valley Company owned a majority of the stock was in no way related to its ownership of land in the service area. It owned a majority of the stock at the time of the amendment and also after the amendment. The stock, being non-appurtenant to the land, was in no position to demand water service until someone owning

land in the service area had purchased it and was in a position to request water service.

5. The mere ownership of stock in the Water Company without ownership of land in the service area does not entitle one to water service. There must be a union of ownership of stock in the Water Company and land in the service area before one is entitled to water service. This is expressly spelled out in the articles of incorporation. The mere fact that The Ojai Valley Company can transfer these shares of stock to anyone it chooses is meaningless, for no one would purchase stock in the water company unless he also owned land in the service area and then he would be entitled to one share for each acre of land in order to obtain water service.

6. The amendment to the articles was challenged only on the ground of lack of notice. This was the theory upon which it was presented to the trial court. Appellant is shifting his position on appeal, now claiming that irrespective of whether notice of the amendment to the articles was given, that the amendment is still void. The reason for the amendment has been fully explained.

7. Appellant, according to his own complaint, ten years after the adoption of the 1935 amendment to the articles, purchased land in the service area and received stock on the basis of one share per acre of land, and went along for many years before expressing his ideas in his complaint, charging fraud, dishonesty, overreaching, mis-handling and other claims of wrongful acts on the part of appellees.

8. Appellant's concern for the minority stockholders ignores the fact that many of these minority stockholders did not acquire lands from the so-called Libbey interests or the Valley Company, yet have been receiving water

since 1920 on the same basis as those acquiring their lands from the so-called Libbey interests. Appellant's allegations respecting a class or derivative action is an allegation only. Appellant does not point to one complaint over the years ever made by any stockholder to the Water Company, expressing dissatisfaction with its operation or management, and it is indeed passing strange that the terrible situation set forth by appellant has not resulted in a swarm of lawsuits by the injured stockholders to correct their grievances, yet we find appellant the only complainer of the alleged sinister conduct on the part of appellees.

9. At the time of the trial the learned trial judge quickly saw through the fallacious and insupportable contentions of the appellant respecting the various causes of action alleged and set forth in his complaint, and dismissed them on the ground that they did not state claims upon which relief could be granted, yet at the same time took testimony on the issue of the 1935 amendment to the articles of incorporation, which he found to be valid on the question of notice, that being the only point toward which appellant directed his proof.

The record discloses that the action of the trial court should be affirmed.

Respectfully submitted,

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Attorney for Appellees.

Nos. 14945-14946.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a corporation, and
THE OJAI VALLEY COMPANY, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

	PAGE
Erratum	Preface
I.	
Theory of the complaints.....	1
The complaints and each cause of action thereof state claims upon which relief can be granted.....	1
A. Appeal No. 14945.....	1
B. Appeal No. 14946.....	5
II.	
Appellees' pleaded defenses.....	6
Appellees' pleaded defenses require a trial on the merits to determine their validity.....	6
III.	
The articles of incorporation.....	7
Appellant properly pleaded the articles of incorporation of Ojai Mutual Water Company.....	7
IV.	
The findings of fact with respect to notice.....	8
The statutory presumption of regularity fails in the face of substantial evidence	8
V.	
Both No. 14945 and No. 14946 are properly pleaded class suits	9

VI.

Appellees' "Conclusion" 11

Such "Conclusion" reveals no basis for sustaining the judgments of the District Court..... 11

VII.

In summary 17

The real gist of these actions is the matter of control of Ojai Mutual Water Company..... 17

TABLE OF AUTHORITIES CITED

CASES	PAGE
Ariasi v. Orient Insurance Company, 50 F. 2d 548.....	9
Butte County Water Users Association v. Railroad Commission, 185 Cal. 218.....	3
Cohen v. Industrial Finance Corp., 44 Fed. Supp. 491.....	10
Copeland v. Fairview Land and Water Co., 165 Cal. 148.....	3, 14
Gottesfeld v. Richmaid Ice Cream Co., 115 Cal. App. 2d 854....	10
Idaho Irrigation Company v. Gooding, 265 U. S. 518.....	19
Imperial Water Company No. 5 v. Holabird, 197 Fed. 4.....	3, 7, 18
McDermont v. Anaheim Union Water Company, 124 Cal. 112....	14
Pacific States Savings and Loan Corporation v. Schmitt, 103 F. 2d 1002.....	19
Palo Verde Land and Water Company v. Edwards, 82 Cal. App. 52	4
Pepper v. Litton, 308 U. S. 295.....	2, 18
Perlman v. Feldman, 219 F. 2d 173.....	2, 18
Prosole v. Steamboat Canal Company, 37 Nev. 154, 140 Pac. 720	3
Smith v. Dorn, 96 Cal. 73.....	10
Southern Pacific Company v. Bogert, 250 U. S. 483.....	2, 14, 18
Subin v. Goldsmith, 224 F. 2d 753.....	2
Wheat v. Thomas, 209 Cal. 306.....	5

RULES

Federal Rules of Civil Procedure, Rule 8(d).....	6
Federal Rules of Civil Procedure, Rule 23(b).....	9

STATUTES

Civil Code, Sec. 324.....	4
Civil Code, Sec. 362b.....	9

Erratum.

Appellant, in his Opening Brief, inadvertently stated, on page 2 thereof, that the First Amended Complaint in Appeal No. 14945 contained the words ". . . the action is not collusive to confer jurisdiction on the Federal Courts." This language is in the complaint in Appeal No. 14946, not in 14945.

Such language is not required by the Federal Rules of Civil Procedure in Appeal No. 14945, it not being a derivative or secondary action; however, such language is required by Rule 23(b) Federal Rules of Civil Procedure in a derivative or secondary action, and thus is included in the complaint in Appeal No. 14946.

Nos. 14945-14946.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a corporation, and
THE OJAI VALLEY COMPANY, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

I.

THEORY OF THE COMPLAINTS.

The Complaints and Each Cause of Action Thereof
State Claims Upon Which Relief Can Be Granted.

Appellees, in their Brief, have both oversimplified and misconstrued the pleadings.

A. Appeal No. 14945.

FIRST CAUSE OF ACTION.

Appellant fully pleaded the facts entitling him to relief (as abstracted in App. Op. Br. commencing at p. 4). From these averments, a court sitting in equity is entitled, both in fact and in law, to conclude that there was a fraudulent overreaching by The Ojai Valley Company as controlling stockholder of Ojai Mutual Water Company. The attempted 1935 amendment to the Articles of Incorporation was void, not only for lack of notice of the meeting at which it was purportedly passed, as required by law, but also because it was an improper and inequitable use of an interlocking directorate and majority control to perpetuate, by an unlawful device, that same

control—all within the meaning of such cases as *Pepper v. Litton*, 308 U. S. 295; *Southern Pacific Company v. Bogert*, 250 U. S. 483; *Subin v. Goldsmith*, 224 F. 2d 753; *Perlman v. Feldmann*, 219 F. 2d 173. These and many other cases are cited in Appellant's Opening Brief. Further, since contrary to Articles and By-laws there had never been any stock assessments, The Ojai Valley Company had, in effect, through water dues alone, compelled the minority stockholders to pay for substantial capital improvements to Ojai Mutual Water Company and thus increase the value of The Ojai Valley Company's large block of control shares at no expense to this same The Ojai Valley Company. In addition, The Ojai Valley Company has put itself in a position to realize an excessive and unwarranted profit to the promoters of the Water Company to the detriment of the grantees of these same promoters and The Ojai Valley Company.

The Articles of Incorporation of the Water Company [Tr. Rec. pp. 30 and 31] provide:

"This company is *not* authorized to engage in the business of selling, dealing in or distributing said or any water *for profit*, or for compensation, or as a public service corporation, and none of its waters shall ever be for sale, rental or distribution, and *for the delivery of said water to them by said company said stockholders shall pay only such an amount as may be sufficient to pay the cost of management, maintenance and operation of the company and for the delivery of said water to them.*" (Emphasis added.)

SECOND CAUSE OF ACTION.

The second cause of action pleads by inclusion the facts alleged in the first cause of action, and then pleads facts showing an express contract between both Appellee corporations and the grantees of The Ojai Valley Company who are minority stockholders of Ojai Mutual Water

Company that such water would be used only on The Ojai Valley Company and Libbey lands, etc. Also, additional facts are alleged from which such a contract between them may be implied in fact and in law. See, for example, the language quoted in Appellant's Opening Brief on page 31, from *Prosole v. Steamboat Canal Company*, 37 Nev. 154, 140 Pac. 720. The allegations in the second paragraph of said second cause of action [Tr. Rec. p. 15] is almost verbatim the language in the concurring opinion of Shaw, J., in *Butte County Water Users Association v. Railroad Commission*, 185 Cal. 218, at p. 235.

THIRD CAUSE OF ACTION.

The third cause of action was dismissed upon Appellant's own motion, by stipulation, because said third cause of action was necessarily included in the first cause of action.

FOURTH CAUSE OF ACTION.

After pleading by inclusion the facts previously alleged, Appellant sets forth the trust relationship and the "*alter ego*" status of The Ojai Valley Company and its promoters, and alleges a breach of the trust relationship, using the theory of *Copeland v. Fairview Land and Water Company*, 165 Cal. 148; *Imperial Water Company No. 5 v. Holabird*, 197 Fed. 4, and other cases cited in Appellant's Opening Brief commencing on page 32.

FIFTH CAUSE OF ACTION.

Appellees in their Brief have incorrectly stated the facts alleged in saying that Appellant contends that "no others have any rights to the use of this water."

This is exactly the opposite of the truth. Appellant specifically alleges that the Water Company's water is imported from an underground source more than two miles away, that there are numerous other users from the Basin who also have rights to this water, and that the water supply is critically short. [Tr. Rec. pp. 19,

20 and 21.] Appellant earnestly contends that no outside interest should be permitted to purchase the large block of stock now held by The Ojai Valley Company which is the promoters' *alter ego*, since it would be detrimental to its own and the promoters' grantees, of whom this Appellant is one.

SIXTH CAUSE OF ACTION.

Again Appellees are incorrect in their statement of Appellant's averments.

Appellant clearly and concisely alleges [Tr. Rec. p. 21, II and III] that as between The Ojai Valley Company, the grantees of The Ojai Valley Company and the Libbey Interests, and the Water Company itself, said shares have been made, and are treated as, appurtenant to the land granted to the shareholders by The Ojai Valley Company and the Libbey Interests, and that The Ojai Valley Company has improperly and in violation thereof treated its own shares as personalty and thus freely transferable.

Appellees have consistently argued and contended that, since the Articles of Incorporation do not specify that the shares are appurtenant to specific land, such cannot possibly be the case, and they quote at length from the case of *Palo Verde Land and Water Company v. Edwards*, 82 Cal. App. 52, commencing on page 39 of Appellees' Brief.

But in Appellees' own case the Court clearly admits that compliance with Section 324 of the Civil Code is *not* required:

"Nor is there any evidence in the record showing that the Water Company by its acts or practices held the water stock to be appurtenant to the land upon which it is located."

Since Appellant has alleged that the shares have in fact and by agreement been treated as appurtenant to specific land, he is surely entitled to prove said allegations on a fair trial.

On page 41 of their Brief, Appellees cite, and quote from, the case of *Wheat v. Thomas*, 209 Cal. 306, as follows:

“The right of a stockholder in a mutual water company to receive water by virtue of his ownership of stock is real property but the shares themselves are personalty and do not pass upon a conveyance of land *unless they are appurtenant* thereto; they *may* become appurtenant by the adoption of appropriate provisions in the By-Laws of the water company under Section 324 of the Civil Code, but *one claiming that they are appurtenant, is required to prove it.*” (Citing many cases; Emphasis added.)

Appellant is anxious to do just exactly this—he wants the opportunity to prove that the shares are appurtenant, as is permitted even by the authorities which Appellees cite. Appurtenancy is a mixed question of law and fact. This, it is submitted, is not a matter to be decided upon motion to exclude evidence or to dismiss.

SEVENTH CAUSE OF ACTION.

The allegations in Appellant’s seventh cause of action set forth Appellant’s right to a declaration of rights, since there is clearly a controversy.

B. Appeal No. 14946.

As Appellees point out in their Brief (p. 6 thereof), the complaint in Appeal No. 14946 alleges discrimination on the part of Ojai Mutual Water Company, while in control of The Ojai Valley Company, in furnishing and delivering water to its consumers, claiming that certain consumers have been receiving water at a lower cost than other consumers. Appellant also specifically, and in detail, alleges fraud.

Whether or not these facts exist is a matter for the trial court to decide after all the evidence has been introduced.

II.

APPELLEES' PLEADED DEFENSES.

Appellees' Pleadings Require a Trial on the Merits to Determine Their Validity.

Appellees by general denial directly put in issue many of the facts alleged in Appellant's two complaints and each and every cause of action therein.

With the exception of the one narrow issue of fact (as to whether or not proper notice had been given), the question of the truth of facts pleaded in the complaints is not before this Court. We are here on the question of sufficiency of the complaints, and must assume that all facts therein well pleaded are true. Thus, Appellees' many and lengthy denials of the truth of the facts alleged are totally immaterial on appeal and are unduly burdensome to the record [for example, see Tr. Rec. pp. 277 to 287, incl., and most of the points and arguments made by Appellees in their Brief, to which we will refer later].

As to the sixth defense of Appellees, most of the matter therein alleged [Tr. Rec. p. 69 *et seq.*] are pure matters of fact, which are by Rule 8(d) Federal Rules of Civil Procedure deemed controverted by Appellant, and upon which a trial should be had to determine their truth.

Both in said sixth separate defense, and in their seventh separate defense, Appellees have apparently tried to set up an estoppel.

But an analysis of Appellees' position clearly shows that the exact opposite of an estoppel is shown by the facts pleaded. Rather than being detrimental to Appellee The Ojai Valley Company, The Ojai Valley Company by reason of Appellant's alleged inaction has actually made more stock sales and more land sales, and thus has improved its position financially many times over.

Appellant is not now trying, nor has he ever tried, to deprive any present bona fide user of Ojai Mutual Water Company service.

Appellant's entire position has been remedial in nature: He is asking the Court to prevent further or additional wrongs.

These are actions in the nature of bills *quia timet*, to prevent threatened additional injury.

In pleading waiver, acquiescence and consent in their eighth and ninth separate defenses, Appellees have totally ignored the principles enunciated by the court in *Imperial Water District No. 5 v. Holabird*, *supra*. Since this is the only adequate source of water [Tr. Rec. p. 12, XV], the mere acceptance of water service cannot be construed as a waiver, acquiescence or consent to the fraudulent overreaching and breaches of trust perpetrated by appellee The Ojai Valley Company upon the minority stockholders of Ojai Mutual Water Company. And the court so held in the *Holabird* case, *supra*.

III.

THE ARTICLES OF INCORPORATION.

Appellant Properly Pleaded the Articles of Incorporation of Ojai Mutual Water Company.

Appellees contend that the Articles of Incorporation and the By-Laws of the corporation are the total measure by which the rights, duties and liabilities of the corporation and its stockholders are defined, and even contend that a pleading of the Articles of Incorporation by Appellant binds Appellant to the express language of the Articles and precludes Appellant from showing any further agreements.

Needless to say, if Appellees were correct in such contention, all corporate litigation would resolve itself into an interpretation of the Articles and By-Laws. The many, many cases cited by Appellant of course show this to be a false concept.

Actually, the very fact that the Articles permit a service area of 2,675 acres shows why Appellant and the other minority stockholders similarly situated need protection from this Court. Appellant, as hereinabove set forth, clearly alleged that there was never any intention to serve more than approximately 500 acres of land. [Tr. Rec. p. 9.]

The Articles of Incorporation, by authorizing 3,000 shares, on the basis of one share per one-quarter acre of land, would not possibly permit a servicing of more than 750 acres; and indeed, the original and *only* issue of shares, numbering 2,003 shares, at one share per one-quarter acre of land, would not permit the servicing of more than about 500 acres.

The Articles were pleaded also to give a foundation for Appellant to show in what respects the actual contract with the stockholders is different; the Articles are necessary as background information, but the complaint goes on specifically and in considerable detail to explain what the actual contract between the corporation and its stockholders consists of.

IV.

THE FINDINGS OF FACT WITH RESPECT TO NOTICE.

The Statutory Presumption of Regularity Fails in the Face of Substantial Evidence.

As stated by Appellant in his Opening Brief, commencing at page 19, the testimony was clear, convincing and absolutely unrefuted that no notice of the 1935 meeting had been given at which the 1935 amendment to the Articles of Incorporation of Ojai Mutual Water Company was purportedly passed. Even Mr. Harmon, an adverse witness and an officer, director and stockholder of Ojai Mutual Water Company, stated that he not only did *not* receive any notice, but that “we don’t send them out, generally speaking”, and that it was his understand-

ing that no notice is required to be sent out of the annual meeting of stockholders. [Tr. Rec. pp. 222, 227 and 228.]

Appellees, in their Brief (commencing at p. 15), cite many sections of the Code of Civil Procedure of the State of California with reference to the matter of statutory presumption and the effect thereof.

It is our understanding, however, that matters of evidence are procedural, and that therefore the Federal law—not the State law—of evidence applies. See *Ariasi v. Orient Insurance Company*, 50 F. 2d 548, cited in Appellant's Opening Brief at page 21.

Regardless of Appellees' arguments to the contrary, Section 362b of the California Civil Code constitutes no more than a statutory presumption, and therefore the *Ariasi* case applies. And thus, in the face of actual, substantial evidence, the statutory presumption must fall.

V.

BOTH NO. 14945 AND NO. 14946 ARE PROPERLY PLEADED CLASS SUITS.

Appellees, in their Brief, do not cite authorities or even attempt to meet the points made in Appellant's Opening Brief, pages 22 and 23 thereof.

Appellees do, however, obliquely challenge Appellant's compliance with Rule 23(b) Federal Rules of Civil Procedure by stating—incorrectly—that

“Appellant entirely failed to set forth with particularity the efforts of Appellant to secure from the managing director or trustees and if necessary from the shareholders such action as he desired
. . . .”

In the first place, such allegation is required only in a secondary, or derivative, action by a shareholder (Rule 23(b) Federal Rules of Civil Procedure). Appeal No. 14945 is not a derivative or secondary action, but is brought in the individual and primary right of Appellant and of the stockholders similarly situated, all as alleged

and set forth in the First Amended Complaint. [Tr. Rec. p. 3 *et seq.*]

As for Appeal No. 14946, Appellant very clearly and completely alleged [Tr. Rec. p. 5, Subparagraph (d)] that with common directors, and complete voting control of the Water Company being in The Ojai Valley Company, and in view of the allegations thereafter contained and the allegations contained in plaintiff's First Amended Complaint (being Appeal No. 14945), any demand upon the defendants The Ojai Valley Company and Ojai Mutual Water Company would be useless and of no benefit. Thereafter, Appellant alleged in said complaint the facts entitling the minority stockholders to relief, that the attempted amendment to the Articles of Incorporation in 1935, and the amendment of the By-Laws in accordance therewith, was "void as being unreasonable and inequitable and a fraudulent device to retain control of the Water Company by said The Ojai Valley Company" [Tr. Rec. p. 23.] It is the established rule that where actual fraud on the part of the controlling interests of a corporation is alleged, or when demand would be otherwise useless, formal demand is not necessary. (*Smith v. Dorn*, 96 Cal. 73; *Cohen v. Industrial Finance Corp.*, 44 Fed. Supp. 491; *Gottesfeld v. Richmaid Ice Cream Co.*, 115 Cal. App. 2d 854.)

In Appeal No. 14945, referred to as aforesaid in the complaint in Appeal No. 14946, Appellant had alleged with particularity his efforts to get Mr. C. J. Wilcox, "the chief executive officer of both defendants and of the trustees of the estate of Edward D. Libbey", to have the surplus Ojai Mutual Water Company shares canceled or placed in trust for the individual owners, etc. [Tr. Rec. pp. 13 and 14], and then alleged that the said C. J. Wilcox refused and neglected to act on said demands. Mr. Wilcox was the President and Treasurer of both of Appellee corporations, and a director of both corporations, and had been such since 1925 and before [Tr. Rec.

pp. 189, 190], and was one of six trustees of the estate (of Edward D. Libbey) and the manager thereof [Tr. Rec. p. 190], and was the person to whom “the other people in the corporation back in Toledo have left things generally up to . . .” [Tr. Rec. p. 195.]

Appellees thereafter state that Appellant “makes no allegation in his complaint that he has made any demand upon any of the minority shareholders . . .” This would have been so patently and utterly fruitless as to be ridiculous.

VI.

APPELLEES’ “CONCLUSION.”

Such “Conclusion” Reveals No Basis for Sustaining the Judgments of the District Court.

On pages 51, 52 and 53 of their Brief, Appellees have written their “Conclusion”, which is a fair summary of their position on appeal.

Rather than attempting to answer the inconsistencies and irrelevancies contained in Appellees’ Brief, line by line, and page by page, Appellant will answer Appellees’ “Conclusion” instead.

Such “Conclusion” makes nine points:

The *first point* attempts to limit Appellant to the Articles and By-Laws to define the rights, duties and liabilities of the parties.

But in addition to our observations in Section III above, the District defined by the Articles of Incorporation is of course permissive in character; there is no obligation on the part of the Water Company to supply all of these 2,675 acres, even if the Water Company were able to do so. It is not a public utility or “a public service corporation.” [Art. of Incorporation, Tr. Rec. p. 31.]

The By-Laws of the Water Company [Tr. Rec. p. 15, Appeal No. 14946] do not permit servicing of additional lands if such additional service would interfere with or

limit the supply of water to be furnished to the lands covered by the schedule or schedules in force at the time. In view of Appellees' allegations of water shortage, we arrive again at a pure question of fact—that of adequacy of water supply.

Further, as between these two Appellee corporations and their common promoters on the one hand, and the Appellant and other minority shareholders on the other, the contract as evidenced by the Articles and By-Laws was modified by other expressed agreements, and agreements implied in fact and in law, all as fully and completely set forth in both complaints. Also, as has been pointed out in Appellant's Opening Brief, Appellees are *estopped* to assert, for example, that The Ojai Valley Company's shares in the Water Company are freely transferable.

The *second*, *third*, and *eighth points*, and the first half of the *ninth point* made by Appellees merely attempt to controvert facts well pleaded in the complaints, by arguing matter not in evidence. As stated in Opening Brief, we are before this Court of Appeals on the sufficiency of the complaints (except for one narrow issue of fact, that of notice).

Appellees, in their motions to dismiss, expressly admitted all facts well pleaded. [Tr. Rec. pp. 173 and 175.]

The *fourth point*, of course, assumes that The Ojai Valley Company shares are freely transferable, that they are not appurtenant by agreement or by operation of law, that The Ojai Valley Company is not estopped to assert that said shares are freely transferable, and that The Ojai Valley Company owes no duty to its grantees to refrain from selling its control shares to whomever it wishes, even though such sale would result in insufficient water supply to the properties already sold to these grantees by The Ojai Valley Company.

These assumptions are questions of fact, or mixed questions of fact and law, which can only be decided after all of the evidence is in, on a proper trial of the issues.

Thus, Appellees beg most of the vital questions to be decided on trial; they base their conclusion on a false premise.

The *fifth point* made by Appellees in their Brief shows that Appellees have blinded themselves to the very matters of which Appellant complained and the damage and threats of further damage already evident in The Ojai Valley Company's entire scheme to perpetuate control.

How can Appellees state that "the mere fact that The Ojai Valley Company can transfer these shares of stock to anyone it chooses is meaningless . . ."? As fully alleged in the complaints, this Water Company is the only source of water supply for many homes. There is a critical water shortage, and the Water Company is unable to extend its distribution system in any manner without depriving property owners of vital water supply. [Tr. Rec. pp. 12 and 20.] Simple arithmetic makes it apparent that if the water users are approximately trebled by dumping 1,300 surplus shares on the market, the existing users must suffer by reason of the fact that there is not possibly enough water to go around. The fact that there are a total of 2,675 acres which the Water Company might attempt to service (whereas at the present time only about 600 or so acres are actually being supplied) clearly shows the threat of water shortage.

Furthermore, as this Court well knows, control is an exceedingly valuable asset. Control would permit further amendments to the Articles of Incorporation, to say nothing of a continuation of the inequities under which existing minority stockholders have already suffered. The cases cited by Appellant in his Opening Brief clearly enunciate the law applicable.

By their *sixth point*, Appellees assert that Appellant is raising, for the first time on appeal, the theory that the

1935 amendment to the Articles of Incorporation was void regardless of whether or not notice of the meeting was given.

But counsel *overlooks* the fact that:

1. The complaint in No. 14946, in Paragraph XVII thereof [Tr. Rec. p. 23], specifically alleges this theory;

2. The first amended complaint in No. 14945 alleges facts upon which such theory can be predicated;

3. In transcript of the record, pages 180 and 181, Appellant stated on opening argument, and therein reiterated, that the 1935 amendment was void regardless of notice, and quoted from the *Bogert* case;

4. In Tr. Rec. pp. 184 and 185, Appellant Lucking argued this very theory at length;

5. In Tr. Rec. p. 207, after objection to counsel's question to Mr. Wilcox, this theory was specifically stated;

6. In Tr. Rec. p. 245 this theory was again specifically referred to;

7. In Tr. Rec. p. 272 once again Appellant let the District Court know that he felt this theory was important.

As to the *seventh point*, wherein Appellees contend that Appellant was guilty of laches, and that the statutes of limitation apply, Appellant states that:

(a) We are involved here with a *vested right*, not a mere contract right, and thus the right cannot be lost by mere passage of time. (*Copeland v. Fairview Land and Water Company, supra.*)

(b) If the 1935 attempted amendment to the Articles was void initially (either for want of statutory notice, or because it was a fraudulent overreaching), it is still void. Mere passage of time does not make valid a void act. (*McDermont v. Anaheim Union Water Company*, 124 Cal. 112.)

(c) Appellant knew nothing of the attempted 1935 amendment until 1948, nor of the practice and cumulative effect of the transfer of one share per acre of land sold by The Ojai Valley Company. Actually, as alleged, Appellant was told by the President of both corporations that four shares per acre on his twenty acre purchase "would make the purchase price of this property on entirely too low a basis" [Tr. Rec. p. 8]; there was no disclosure of the true reason for withholding additional shares.

(d) Repeated demands made of C. J. Wilcox as President, Treasurer and Director of both corporations, commencing in 1948, brought no fruit;

And it was not until Mr. Wilcox's letter of May 24, 1950 that there was a refusal to put the matter before his Board. [Tr. Rec. p. 103.] This was a condition precedent to bringing suit, and without a demand and refusal suit would have been premature. The first complaint was then filed in 1951.

(e) No detriment or change of position by The Ojai Valley Company or Ojai Mutual Water Company as a result of Appellant's inaction (if any) has been alleged or shown. On the contrary, the 1935 device has enabled The Ojai Valley Company to control Ojai Mutual Water Company, and thus not assess its own stock for capital improvements, but instead to make the *users*—its own grantees—pay for the value of these very control shares, all of which is contrary to By-Law and the very nature of *mutual* companies.

(f) There was no threatened bulk sale until about 1949, within Appellant's knowledge. Indeed, the reasonable inference to be derived from Mr. Wilcox's letter of October 4, 1948 [Tr. Rec. p. 94] is exactly the opposite.

(g) Appellee The Ojai Valley Company is in a position of trust, both by reason of its being the *alter ego* of the

promoter of both corporations, and a majority shareholder therein, and having interlocking directorates with Ojai Mutual Water Company. There exists a confidential and fiduciary relationship, and The Ojai Valley Company has a duty to treat minority shareholders fairly and without discrimination, and to disclose fully, which it did not do.

(h) Appellant Lucking is trying to halt further breaches. There is a continuing wrong and the threat of future and more serious wrongs.

Appellant is not trying—and has never tried—to deprive any present bona fide user of his water service, no matter how wrongful The Ojai Valley Company and Ojai Mutual Water Company may have been in giving such service initially. Further, it can be assumed that the District Court, after all the evidence is before it, will adequately protect innocent persons.

(i) The question of laches must be viewed in the light of surrounding circumstances, to be adduced on trial and upon the introduction of evidence. Mere passage of time in and of itself is not sufficient basis upon which to predicate laches.

Appellees' *eighth point* in their "Conclusion", as previously stated above, merely attempts to brand as untrue those facts which Appellees have already admitted are true for purposes of their motions to dismiss. [Tr. Rec. p. 173.]

We reiterate, we are before this Court principally on a matter of the sufficiency of the complaints. There is not one scintilla of evidence in the record to refute or contradict Appellant's allegations.

The same comment is made of the first portion of the *ninth point*.

As to the last half of the *ninth* and final point in Appellees' "Conclusion", Appellees assert that the only point toward which Appellant directed his proof was on the

matter of notice of the validity of the 1935 attempted amendment to the Articles.

Such was the only evidence *permitted* by the District Court. [Tr. Rec. pp. 183, 193.] The District Judge expressly and repeatedly limited Appellant to this one narrow issue of fact, and then granted Appellees' motions to exclude all other evidence and to dismiss the complaints. [Tr. Rec. p. 289.]

It is seen, therefore, that of the nine points which Appellees make: The first is legally incorrect; the second, third, eighth, and the first half of the ninth are completely extraneous to the issues on appeal; the fourth is based upon an assumption which is legally and factually incorrect; the fifth is overthrown by elementary arithmetic; the sixth is completely refuted seven times in the record; the seventh is not borne out by fact, law or the pleadings; and the final point made—that Appellant directed his proof only to the question of notice—is specious, and truly characterizes the entire defense of Appellees.

VII.

IN SUMMARY.

The Real Gist of These Actions Is the Matter of Control of Ojai Mutual Water Company.

Appellees repeatedly argue that control is unimportant, that "the mere fact that The Ojai Valley Company can transfer these (control) shares of stock to anyone it chooses is meaningless . . .", that The Ojai Valley Company has benevolently conducted its stewardship for many years, and the like.

But it is earnestly submitted that *control* is the root of most of the ills complained of, and makes possible the continuing and threatened wrongs with which the minority stockholders are faced.

If The Ojai Valley Company had not wrongfully, and through the device of the 1935 amendment to the Articles, perpetuated its own control.

There would have been stock assessments levied, so that each share would have contributed its own fair proportion of the capital improvements of the Company [see Art. of Incorporation, Tr. Rec. pp. 30, 31.]

All shares would have been appurtenant to specific land, rather than some shares being made appurtenant and some not, which results in practical effect in there being two classes of shares where only one class is authorized by the Articles.

There would have been no discriminatory water rates to the favored Country Club while under the ownership and management of The Ojai Valley Company.

And the minority stockholders would not now be threatened with a bulk sale of the control shares to outside interests, which would cut the available water of each shareholder down to a point where there just wouldn't be enough to go around.

After all, mutual water company stock is not to be traded on the open market like grain futures or General Motors; it should be held firmly in the hands of those who *use* the water, and whose homes depend upon the water supply. This water company is a *non-profit mutual* company. [Art. of Incorporation, Tr. Rec. pp. 30, 31.]

And corporate control should not be traded like a commodity, either, to the injury or detriment of minority stockholders. Cases like *Pepper v. Litton*, 308 U. S. 295; *Southern Pacific Company v. Bogert*, 250 U. S. 483; *Perlman v. Feldmann*, 219 F. 2d 173; *Imperial Water District No. 5 v. Holabird*, 197 Fed 4—(all previously cited in App. Op. Br.) hold that a promoter and controlling stockholder cannot, by a device, perpetuate control and use it—or threaten to use it—to the detriment of minority stockholders, particularly where these minority stockholders are, as in the case at bar, actually the grantees of this same controlling interest.

From a remedial standpoint, *Idaho Irrigation Company v. Gooding*, 265 U. S. 518 (cited in App. Op. Br.), is a landmark case, particularly when read in conjunction with the opinion of the Court of Appeals. There the Supreme Court of the United States canceled all remaining shares of the Irrigation Company which had not already been put to beneficial use, saying:

“ . . . But the Irrigation Company is without right to continue to contract to sell and deliver water from a supply that has already been exhausted, thereby compelling these owners to still further diminish their proportionate rights.”

The Court of Appeals in *Pacific States Savings and Loan Corporation v. Schmitt*, 103 F. 2d 1002, held:

“In the hands of Appellee, *these shares possess no more than a nuisance value*, but to Appellant they represent indicia of title *and the essential right to participate in management*. We perceive no good reason why Appellant should not have the relief prayed for.” (That is, ownership of the shares.) (Emphasis added.)

It is sincerely urged, as stated in Appellant's Opening Brief, that there is absolutely no difference in the final result between:

1. The 1935 attempted amendment to the Articles of Incorporation of Ojai Mutual Water Company, changing four shares per acre to one share per acre, and

2. The Ojai Valley Company's causing the Water Company to issue to The Ojai Valley Company additional shares for no consideration whatsoever, so as to perpetuate its control. The latter is, of course, obviously illegal, since no preemptive rights are recognized and nothing paid for these additional control shares.

Thus, The Ojai Valley Company has indirectly by a device, caused Ojai Mutual Water Company to do something which was a fraud on the minority stockholders and which it clearly was prohibited from doing directly—whether notice of the 1935 amendment had been given or not.

Appellees have argued that this action is confiscatory. Not so, however: Appellant has never, and does not now, seek to deprive any bona fide existing user of his water service. Further, Appellant in his complaint in No. 14945 has expressly and specifically prayed that the Court take an account of any moneys owing for said Ojai Mutual Water Company's plant—and if a balance in favor of The Ojai Valley Company is found, that this payment be provided for in some equitable manner. [Tr. Rec. p. 25.] Appellant, in asking for equitable relief, is offering to do equity.

We respectfully suggest that the Court reread Exhibits "E" to "K" inclusive [Tr. Rec. pp. 91 to 104], containing illuminating correspondence between Appellant and Mr. Wilcox.

All Appellant wants is the opportunity to present his evidence to the District Court, and let the facts speak.

Thus, in equity and good conscience, the judgments of the District Court should be reversed, and the actions remanded for trial on the merits.

Respectfully submitted,

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WM. A. LUCKING, JR.,
Of Counsel.

14951

United States Court of Appeals

For the Ninth Circuit

ART JOHNSTON,

Appellant

vs.

HUGH EARLE, Collector of Internal
Revenue, et al,

Appellee

Appeal from the United States District Court for
the District of Oregon

APPELLANT'S BRIEF

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INDEX

	Page
Facts Relating to Jurisdiction.....	1
Pleadings Relating to Jurisdiction.....	2
Statement of Case.....	3
Summary of Argument.....	6
Specification of Error No. 1.....	8
Argument	8
Burden of Proof after Seizure.....	10
Requirement of Warrant	18
Conclusion	26
Appendix	28

TABLE OF AUTHORITIES

Cases Cited:

Buck v. Colbath, 3 Wall 334.....	17, 18, 19
Busey v. Deshler Hotel Co., 130 F. 2d 187.....	13
Dallas County v. McKenzie, 94 U.S. 660.....	17
Gregoire v. Biddle, 177 F. 2d 579; 175 Ore. 351.....	12
Industrial Chrome Plating v. North, 153 Pac. 2d 835.....	17
Land v. Dollar, 330 U.S. 738.....	17
Nelson v. West African Line, 86 F. 2d 730.....	13
North v. Peters, 138 U.S. 271.....	17
Pacific Telephone Co. v. White, 104 F. 2nd 923.....	12
Sabin v. Chrisman, 90 Ore. 85, 175 Pac. 622.....	17
U.S. v. Foster, 131 F. 2d 3.....	14
U.S. v. Lee, 106 U.S. 196.....	16
Yearsley v. W. A. Ross Const. Co., 309 U.S. 21.....	14

Texts Cited:

150 A. L. R. 239.....	11
28 A. L. R., 2d 650.....	13, 15
47 Am. Jur. 860.....	18
47 Am. Jur. 962.....	19

Statutes Cited:

Title 26, Section 3670 U.S.C.	28
Title 26, Section 3654, U.S.C.	10, 26
Title 26, Section 3672 (a) (1) U.S.C.....	11, 28
87-805 Oregon Rev. Statutes.....	11, 29
Title 26, Section 3692 U.S.C.....	5, 14, 16, 18
Constitution of United States (Fifth Amendment).....	15

United States Court of Appeals

For the Ninth Circuit

ART JOHNSTON,

Appellant

vs.

HUGH EARLE, Collector of Internal
Revenue, et al,

Appellee

Appeal from the United States District Court for
the District of Oregon

APPELLANT'S BRIEF

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION OF DISTRICT COURT AND THIS COURT

Facts Relating to Jurisdiction

This case is brought against the former Collector of Internal Revenue for the District of Oregon and certain of his deputy collectors for the recovery of damages resulting from the unauthor-

ized seizure of a certain tractor belonging to and in possession of a person against whom no tax was asserted. The defendants justify the seizure on the theory that the government had a valid lien against the property by virtue of an assessment against the former owner and further that they are immune from a claim for damages even if they had no lien on the theory that they were acting within the scope of their authority in making the seizure. The court held the deputies were acting within the scope of their authority even though the government had no lien and dismissed the action and plaintiff appeals. The Judgment of Dismissal was entered on June 21, 1955 (R. 43) and plaintiff's notice of appeal was filed July 21, 1955 (R. 44). This court has jurisdiction under Title 28, Section 1291 U.S.C.

Pleadings Relating to Jurisdiction

The pretrial order supercedes the pleadings (R. 36) and sets forth the matters in respect to jurisdiction of the District Court as follows:

Contentions of Plaintiff (R 20)

The court has jurisdiction of the subject of the action by virtue of:

- a) The determination of a Federal Question under Title 28, Section 1331 USC.
- b) Title 28, Section 1356 USC specifically grants exclusive jurisdiction to the Federal District Court in cases involving a seizure other than an admiralty seizure.
- c) Title 28, Section 1340 USC specifically, grants jurisdiction to the Federal District Courts to a cause arising under the revenue laws of the United States.
- d) The cause is one arising under the laws and Constitution of the United States.

The Court entered its order respecting jurisdiction as follows: (R. 46, March 7, 1955.)

“that this court have jurisdiction to hear and determine said cause . . .”

Statement of Case

On May 29, 1946, Art Johnston (plaintiff) bought a tractor from one Earl L. Marshall (R. 20—Admitted Fact 4). Two years later the defendants seized the tractor over Johnston’s protests (R. 20—Admitted Fact 5), claiming the right by virtue of unpaid taxes of Marshall (R. 18—Admitted Fact (1c) and (1d)).

Defendants admit they knew at the time of the seizure that Johnston had purchased the tractor and was in possession of it. (R. 20—Admitted Fact 5).

No defendant had any knowledge of whether they had any right to seize it, but all were acting under orders of defendant Shanks (Chief Deputy) who admits he had no knowledge of whether or not the Government had any right to seize the tractor but was too busy to handle the matter personally. (R. 65-66-78-90-94.)

Johnston filed suit against the United States under the tort claims act. The Government defended by claiming a lien against the tractor. The trial Judge (Hon. James Alger Fee) held against the Government in his opinion but later dismissed the suit as not being properly included under the tort claims act.

Plaintiff then brought his action against defendants individually. Defendants each admit they had no belief in the existence of a lien, but were merely acting on orders. (R. 65-66-78-94.) In addition, two Deputy U. S. Attorneys testified that

the officers were told prior to the seizure that they had no right to make the seizure (R. 57) - (R. 103-4).

Again, defendants attempted to justify under a claim that the Government had a valid lien against the property under a claim against the former owner. However, defendants failed to introduce any proof of any lien on the tractor. In fact, the evidence proved the tractor was never in the county where the lien was filed.

However, the court (Hon Claude McCulloch) held that even though the Government did not have a right to make the seizure that the officers were acting within the scope of their authority as federal officers and hence under the doctrine of sovereign immunity, they could not be held liable to plaintiff in damages (R-42 — Findings 6).

Plaintiff objected to the finding (R. 37) and contended defendants' authority was limited by statute and that they had no authority to make a seizure of the property of a stranger unless the Government had a valid lien on the tractor (Title 26, Section 3692). Since there was no valid lien on the

tractor, the seizure was beyond the officers' jurisdiction and was without authority.

Plaintiff appeals from the judgment based on the findings of fact that defendants were acting within the scope of their authority in taking the tractor from plaintiff's possession (R 44).

Summary of Argument

Plaintiff's argument may be summarized by stating that where the authority of Federal officers (Deputy Collector's of Internal Revenue) is limited by statute that such limitation determines the scope of their authority and that they had no implied authority beyond the limitation and that where the seizure is made without such authority, the officers are personally liable for the damages caused by the unlawful seizure and are not immune under the doctrine of sovereign immunity.

The scope of authority of Federal officers whether by statute or by implication can never be greater than the constitutional limitation and no constitutional authority could be granted to any

officer which would permit the taking of one person's property for payment of another's tax liability and hence no such authority could be implied whether limited by statute or not.

When the constitutional power of the sovereign is exceeded then the sovereign itself has no immunity and neither does the officer who acts in its behalf.

The doctrine of immunity is based upon the assumption that the officer's act is that of the sovereign *so long as the officer acts within the scope of his general or special statutory authority*, and since the sovereign is immune in the exercise of its constitutional powers so is the officer who acts in its behalf *so long as he confines himself to the delegated authority*.

Plaintiff simply contends that defendants had no authority except that granted by statute and where the defendants' statutory authority was exceeded, they would be liable to plaintiff in damages which were undisputed and that judgment should have been entered accordingly.

SPECIFICATION OF ERROR No. 1

The Court erred in Entering a Finding of Fact that Defendant officers were acting within the Scope of Their Authority in Taking the Tractor from Plaintiff's possession and in overruling Plaintiff's objection thereto and in Entering Judgment based thereon.

Argument

In this case, the Government asserted a tax liability against a taxpayer by the name of Earl Marshall (R. 18). There was no claim of tax liability against the plaintiff (R. 19 - (2c)). It is admitted that the property (tractor) which was seized by defendants was seized by virtue of the tax liability owed by Marshall (R 20-(5)). It is also admitted that the property was owned by the plaintiff Johnston as purchaser from Marshall (R. 20-(4)). It was admitted that the property was in the possession of the plaintiff and not Marshall at the time of the seizure, (R 20-(5)), and it was further admitted that defendants took the property over Johnston's opposition, and that on previous occasions he had notified them that they had no claim (R. 68).

It appears that at least two Deputy U. S. At-

torneys had advised the Internal Revenue agents that they had no right to touch the property, (R 57-103-104) and it further appears that this advice was given to them prior to the seizure (R. 57).

There was no proof of a valid warrant ever having been issued (R. 19-2 (c) (1).)

On trial in the first action against the United States, and in this action as well, the defendants relied on the fact that the Government had a valid lien on the property at the time of the seizure which they then claimed was prior to the interest of Johnston. They based this claim on the fact that the tractor was located in the county where the lien was filed prior to Johnston's (plaintiff's) purchase thereof.

Defendants each admitted that they had no information as to whether or not the government had such a lien (R. 65-78-94-95).

Defendants Curran and Borthwick testified they merely acted on order of their superior (R. 65-78). Shanks testified that he ordered the seizure

but he had no reason to believe the government had any lien on the property (R. 86-87, 93-94-95).

The sole justification of Shanks is that after 1945 the Collector's office expanded its force and he was no longer able to personally handle the seizures (R. 90).

Earle testified to having no knowledge of anything. He was the Collector. His liability is derivatively asserted under Title 26, Section 3654 U.S.C. (See page 26 this Brief.)

The ownership and possession of the tractor by plaintiff and seizure by defendants being admitted, the burden of proving a valid seizure was upon the defendants.

Burden of Proof After Seizure

“When the defendant officers have seized property in the plaintiff's possession either as plaintiff's or as that of a third person, the burden of proof is upon the officer to sustain his action and if he fails to do so it is immaterial whether or not plaintiff has title. The officer must show 1) seizure under valid process; 2) show he did not abandon his lien (if any) by failing to keep pos-

session or failing to take whatever further steps were necessary to keep it alive; 3) if his process ran against a third person that he had title to the property; and 4) that the property was not exempt from such seizure. 150 ALR 239.

“Where defendants fail to introduce any evidence of such justification, they are liable as failing to sustain the burden of proof.”

It is conceded that the only way defendants could justify the seizure was by proving a valid lien (R. 95). The only way they could prove a valid lien was to prove that the tractor was located in Lane County where the lien was filed (Title 26, Section 3672 (a) (1) U.S.C. - 87.805 Oregon Revised Statutes). (See Appendix, p. 28.)

The narrow question therefore was whether or not the tractor was in Lane County between the date of filing the lien and the date of Johnston's purchase. Defendants failed to produce any evidence of its location at any time while plaintiff's evidence proved it was not in Lane County during that time or any other time. The court properly holds that the officers made a “mistake” of fact in believing the tractor was in Lane County (addi-

tional memorandum of decision — original form — not printed).

The court held, however, that even though the seizure was wrongful that the officers were acting within the scope of their authority and were, therefore, not liable for their “mistake of fact” in regard to the location of the tractor (Memorandum of Decision and additional memorandum — original form — not printed.)

The question on appeal therefore is:

Was the trial Court in error in holding that:

“Defendants were acting within the scope of authority in seizing plaintiff’s property?”

The scope of authority rule relied on by the court is stated on the Court’s opinion as follows:

“Public officials acting ‘within the scope of their authority’ are immune from personal liability for a mistake of fact.”

Citing:

Gregoire v. Biddle, 177 F. 2d 579, and *Pacific Telephone & Telegraph Co. v. White*, 104 F. 2d 923,

Nelson v. West African Line, 86 F. 2d 730 (Memorandum of Decision — original form — not printed.)

Plaintiff contends the rule or cases cited do not apply to the present facts. Defendants' scope of authority was limited by statute and defendants did exceed that statutory authority. The cases cited by the Court apply only to judicial officers (See Annotation — 28 A.L.R. 2d, 650). Plaintiff also contends that there can not be a "Mistake of Fact" unless there is a "belief" that such fact exists. Defendants each testified they were acting only on orders and knew nothing of the location of the tractor or the existence of a lien. Therefore they could not have had a belief in any fact.

The officers' scope of authority could not be enlarged beyond the jurisdiction constitutionally granted by statute. *Busey vs. Deshler Hotel Co.*, 130 F. 2d 187. The statute restricts a Deputy Collector to the seizure of property of the taxpayer *or property on which a valid lien exists*; and then only by valid warrant.

Title 26, Section 3692 U.S.C. states (insofar as applicable):

“In case of neglect or refusal . . . the collector may levy or *by warrant* may authorize a deputy collector to levy upon all property . . . belonging to such person, *or on which the lien . . . exists*, for payment of the sum due . . .”

Statutes delegating powers to public officers must be strictly construed. *U. S. v. Foster*, 131 F. 2d 3, *Yearsley v. W. A. Ross Const. Co.*, 309 U.S. 21.

Having admittedly seized property belonging to a person other than the taxpayer, Deputy Collectors could justify only by acting under a valid warrant regular on its face and directed to the distraining officers to seize specifically the property in question, and then only on the theory that the Government had a valid lien on the property.

The warrant under which defendants claimed to have acted (Warrant No. 65544 (R. 20 item 5) (exhibit No. 11 — original form — not printed) did not describe the property in question in any way. It was not issued by a collector then in office, but

was issued by a former collector (R. 19-2 (c) (1)), and was not regular on its face because it had not been returned within the time limited from its issue date.

The so-called "scope of authority" rule does not extend to every seizure made by an officer purporting to act in his official capacity. The cases cited by the court were limited to judicial officers. (See Note — 28 A.L.R. 2nd 650.)

The scope of authority of an officer can not be extended beyond the Constitutional limitations either by implication of or by statute. It is fundamental that had the statute authorized the seizure of one person's property for payment of another's liabilities, it would be an unconstitutional delegation of authority under the Fifth Amendment to the Constitution of the United States.

"No person shall . . . be deprived of . . . property without due process of law . . ."

It follows, that when defendants did seize the plaintiff's property for application to the taxes of

Marshall the court could not properly justify the seizure by claiming it was within their implied powers, and it clearly was not within their statutory powers (Title 26, Section 3692, U.S.C.). (P. 14.)

In *U. S. v. Lee*, 106 U.S. 196, it was said:

“Not only is no such power given, but it is absolutely prohibited both to the executive and the legislature to deprive anyone of life, liberty or property without due process of law, or to take property without just compensation.”

Where officers levy upon property which is specifically identified in the writ even though the seized property later turns out to belong to a third person, they, of course, are protected; compliance with the writ is considered “due process.” Under those circumstances, the mistake is based upon an erroneous but bona fide “belief” that that the ownership of the property is in another, the officer actually making the levy is protected by his writ where he takes the property described therein and he has no actual notice of any irregularity.

In this case, no defendant testified he believed the property belonged to the person named in the

warrant. In fact they all testified they knew it belonged to Johnston.

A writ commanding a sheriff to levy upon and attach personal property belonging to one named in it without description does not authorize him to seize the property of another and if he does so, he becomes as a trespasser and is unprotected by the law. This is the Federal rule, *North v. Peters*, 138 U.S. 271; *Buck v. Colbath*, 3 Wall 334, and this is also the rule in Oregon. In Oregon, the officers are liable whether or not they have acted in good faith. *Sabin v. Chrisman*, 90 Ore. 85, 175 Pac. 622. *Industrial Chrome Plating v. North*, 175 Ore. 351, 153 P. 2d 835. Good faith is immaterial under the Federal Rule, also, *Dallas County v. McKenzie*, 94 U.S. 660.

In *Land v. Dollar*, 330 U.S. 738, it was said:

“But public officials may become tortfeasors by exceeding the limits of their authority and when they unlawfully seize or hold a citizen’s realty or chattels . . .”

The scope of authority granted to Deputy Collectors of Internal Revenue to distrain property is

limited by statute to cases where a valid warrant of distraint is charged out to them. (Title 26, 3692 U.S.C.). (See page 14 this Brief.)

In this case, the warrant under which defendants operated was not issued by the Collector in office but was issued by a former collector. (See admitted facts pre trial order 2 (a) and 2 (c) (1) R. 19.)

The warrant was dated almost three years earlier (October 17, 1945) and by its terms was required to be returned within 90 days after its date and hence it had expired by its own terms (Ex. 11 not printed) and was therefore not "regular on its face."

Requirements of Warrant

A warrant must be regular on its face and authorize the taking of specific property to protect an officer from liability for seizure of property of a third person and a writ that is void on its face is no protection to the officer who executes it.

47 Am. Jur. 860;

Buck v. Colbath, 3 Wall 334.

The warrant directed the officers designated to make a seizure of the property of Marshall, or any property on which the Government held a valid lien. Johnston's name did not appear on the writ. (Finding of Fact 2 (c) (R. 40).

Even if the warrant had been valid, it gave no authority to seize the property of Johnston. As held in *Buck v. Colbath*, 3 Wall 334. (See also 47 Am. Jur. 962 Sec. 206.)

“An officer who is directed to levy an attachment upon the property of a person without describing any specific property must exercise his judgment and discretion in determining whether the property upon which he proposes to levy belongs to such person, whether it is such as to be subject to be taken under the writ, and as to the quantity to be taken, and he is legally responsible to any person injured for the consequences of any error therein.”

The rule seems clear that where specific property is identified in the writ, and the officer seizes the property described, he is protected even if it later turns out the property belongs to another, but where no property is identified in the writ, the officer seizes the property at his peril.

Even if the writ was valid, the defendant officers must prove they had a bona fide belief that they were seizing under a valid lien since they were admittedly seizing it in the hands of a third person who did not owe the debt.

Defendant Borthwick testified (R. 65):

“Q. Did you know where the tractor was located on October 20, 1945, when the lien was filed?

“A. I have no knowledge of that sir.

“Q. Did you have any knowledge whether there was a lien on the tractor, a valid lien?

“A. I can't remember. That has been a long time ago. The usual procedure in the District was to file a lien in connection with any warrant for distraint which was issued in any sizeable amount. I don't remember what that amount was.

“Q. When you go out to take a piece of equipment on orders from your superior, would you just take your orders or would you check to see if there is a valid lien and so forth?

“A. We just take orders.

“Q. Ordinarily, you would not know whether there was a lien or not?

“A. That is right.”

And on page 68 (R. 68):

“Q. You knew then, I take it from your answer that Mr. Johnston was claiming that the government did not have the right to take it, is that correct?

“A. Yes. Mr. Johnston told me that.

“Q. So when you went out there you knew Mr. Johnston was definitely opposed to the government taking it?

“A. I had plenty of reason to think that, Mr. Erwin.

Defendant Curran testified as follows (R. 78):

“Q. Did you have a warrant with you?

“A. No Sir.

“Q. Did you have any knowledge of such a warrant?

“A. I knew that there was a warrant, yes.

"Q. Did you know against whom it ran?

"A. Yes.

"Q. Who was that?

"A. Mr. Marshall.

"Q. Did you have any knowledge of your own as to whether this tractor was located on October 20, 1945?

"A. No.

"Q. Did you have any knowledge whether you had a valid lien on the tractor or not?

"A. No, that did not concern me. I was just following orders as given to me by Mr. Ellison.

"Q. Ordinarily when you go out to seize something, do you have knowledge of the lien being valid or not?

"A. If a warrant were assigned to me, I would be sure of that first.

"Q. But when you are ordered to take it, you just do that?

"A. That is correct."

Defendant Shanks testified (R. 93) as follows:

“Q. At that time did you have any knowledge of your own as to where the tractor was located at the time the lien was filed?

“A. No. I never had knowledge of where property is located. As I told you, it is automatic procedure . . .”

And on page 95 (R. 95):

“Q. In order to have a valid lien on it as to a purchaser for value, the object or article involved must have been located in the county where the lien is filed, at the time the lien is filed?

“A. That is right. That is what I said.

“Q. My position in that regard is this: At the time you seized it you have no knowledge as to whether or not the tractor was in Lane County or was not in Lane County, at the time the lien was filed.

“A. I had no knowledge; that is right.

“Q. None whatsoever.

“A. That is right . . .”

Mr. Hamilton, a former Deputy U. S. Attorney, testified as follows: (R. 57)

“Q. Did you ask them (officers of Bureau of Internal Revenue) if they had any evidence, to bring in any evidence they might have as to the validity of any lien they might have claimed?

“A. I don’t know that I did at that time. They told me what the facts were, as they knew them, and I said that in my opinion the seizure would be illegal.

“Q. Do you recall whether or not that was based on the fact that they did not have evidence of a valid lien?

“A. That is right. They couldn’t put the tractor in the county where the lien was filed as I recall.”

Mr. Twining, a former Assistant U. S. Attorney testified as follows: (R. 103-104)

“A. . . . At that time, I was not satisfied at all that I had any business to proceed with that nature of action, and I refused to do it. I am sure of that, recalling telling them (Officers of the Bureau of Internal Revenue), however, that if they would bring in some evidence that that condition existed . . . I

think the issue was whether or not that equipment had ever been in one or the other of Marion or Lane Counties.

“At that time it was oral conversation in my office with two agents. I had no proof that there was a lien and for that reason did not bring the process.

“Q. Your recollection is that you asked them to bring in evidence?

“A. I gave my reasons for it, and I said ‘I have nothing before me, no way of telling; it is assumption with me; at this moment, I do not like to take this serious move until I have some basis to support the lien date.’ That is the way I left it.

“Q. Your recollection is that they were claiming a lien against the tractor?

“A. Yes, that was the basis upon which they resented his taking the equipment.”

It should be added that the Collector of Internal Revenue is liable for the acts of his deputies. The Court was in error in its memorandum decision (original form — not printed) in stating that: “Earle (Collector) would not be liable in any event.”

Title 26, Section 3654 (under 1954 Code no comparable section) provides (insofar as applicable):

“General Powers and duties relating to Collector.

a) . . .

b) Deputy collectors; . . . but each collector shall in every respect be responsible, both to the United States and to individuals as the case may be, for every act done or neglected to be done by any of his deputies while acting as such.”

CONCLUSION

The court erred in overruling plaintiff's objections to Findings of Fact Number 6, reading as follows:

“Defendants were each Federal Officers acting within the scope of their authority in taking the tractor from plaintiff's possession.”

and in entering judgment based thereon.

Defendants exceeded the authority granted to them by statute and failed to justify their actions

and as such become trespassers liable to plaintiff for conversion of this property.

The finding was in error and since the judgment is solely based on this finding, the judgment should be reversed with directions to enter judgment in favor of plaintiff and against defendants and each of them in the sum of \$15,000.00 together with plaintiff's costs and disbursements incurred herein.

Respectfully submitted,

WARDE H. ERWIN,

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APPENDIX

Title 26, Section 3670 U.S.C.

“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property whether real or personal, belonging to said person.”

Title 26, Section 3672 U.S.C.

“(a) Invalidity of lien without notice.

“Such lien shall not be valid as against any . . . purchaser . . . until notice thereof has been filed by the collector . . .

“(1) Under State or Territorial laws.

“In the office in which the filing of notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, wherever the State or Territory has by law authorized the filing of such notice of an office within the State or Territory.”

The State of Oregon has authorized the filing as follows:

**Section 87.805 Oregon Revised Statutes, Uniform
Federal Tax Lien Registration Act.**

“Federal tax lien registration filing of notice of lien and certificate of discharge.

“Notices of liens for taxes payable to the United States of America . . . shall be filed in the offices of the recorder of conveyances in counties which have a recorder of conveyances, and in other counties in the offices of County Clerks for the county or counties of this state within which the property subject to the lien is situated.”

No. 14951

United States
COURT OF APPEALS
for the Ninth Circuit

ART JOHNSTON, Appellant

v.

HUGH EARLE, Collector of Internal Revenue,
WALTER S. SHANKS, IRWIN BORTHICK
and IRVING H. CURRAN, Appellees

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

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INDEX

Page

Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument.....	6
Argument:	
The evidence clearly establishes that the acts of the appellees were in all respects lawful.....	8
A. The lien was valid.....	8
B. The appellees acted under a valid warrant for distraint	16
C. The appellees acted within the scope of their authority and are not liable in dam- ages	21
Conclusion	26
Appendix A	27
Appendix B	32

CITATIONS (Cont.)

	Page
United States v. Kings County Iron Works, 224 F. 2d 232	11, 15
United States v. Phillips, 198 F. 2d 634.....	15
United States v. Scovil, 348 U.S. 218.....	15
United States v. Sherman, 98 U.S. 565.....	23
United States v. Worley, 213 F. 2d 509, certiorari de- nied, 348 U.S. 917.....	23

STATUTES

Internal Revenue Code of 1939:

Sec. 3640 (26 U.S.C. 1952 ed., Sec. 3640).....	17
Sec. 3641 (26 U.S.C. 1952 ed., Sec. 3641).....	17
Sec. 3651 (26 U.S.C. 1952 ed., Sec. 3651).....	17, 20
Sec. 3654 (26 U.S.C. 1952 ed., Sec. 3654).....	17, 20
Sec. 3655 (26 U.S.C. 1952 ed., Sec. 3655).....	17
Sec. 3670 (26 U.S.C. 1952 ed., Sec. 3670).....	6, 9, 18, 19, 20
Sec. 3671 (26 U.S.C. 1952 ed., Sec. 3671).....	6, 9, 16, 20
Sec. 3672 (26 U.S.C. 1952 ed., Sec. 3672).....	9, 15
Sec. 3690 (26 U.S.C. 1952 ed., Sec. 3690).....	17, 19
Sec. 3692 (26 U.S.C. 1952 ed., Sec. 3692).....	18, 19, 20
Sec. 3710 (26 U.S.C. 1952 ed., Sec. 3710).....	18
Sec. 3950 (26 U.S.C. 1952 ed., Sec. 3950).....	20
1 Oregon Revised Statutes (1953), Sec. 87.805.....	10
 28 U.S.C.:	
Sec. 1291	1
Sec. 1346	23
Sec. 2680	23

MISCELLANEOUS

Directory of Post Offices, United States Post Office Department	14
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United States
COURT OF APPEALS
for the Ninth Circuit

ART JOHNSTON, Appellant

v.

HUGH EARLE, Collector of Internal Revenue,
WALTER S. SHANKS, IRWIN BORTHICK
and IRVING H. CURRAN, Appellees

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLEES

OPINION BELOW

The findings of fact and conclusions of law (R. 38-42) and memorandum decisions of the District Court (Appendix B, *infra*) are not officially reported.

JURISDICTION

This appeal involves an action instituted in the United States District Court for the District of Oregon

for damages for the alleged unlawful conversion by a Collector and Deputy Collectors of Internal Revenue of certain property of the appellant. (R. 3-5.) The complaint was filed on July 2, 1954 (R. 44), and an amended complaint was filed on February 1, 1955 (R. 3-5). Appellant claims jurisdiction in the District Court under the provisions of 28 U.S.C., Sections 1331, 1340, and 1356. (Br. 2-3.) The District Court entered its judgment on June 21, 1955. (R. 43, 49.) Notice of appeal was filed on July 21, 1955. (R. 44.) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether appellees, a Collector and Deputy Collectors of Internal Revenue, may be held liable in damages for the alleged unlawful conversion of certain property of the appellant which he purchased from the taxpayer, but on which the Government had a prior lien for taxes assessed the taxpayer.

STATUTES INVOLVED

These are set forth in Appendix A, *infra*.

STATEMENT

Some of the facts were stipulated (R. 18-20) and were so found by the District Court (R. 38-42); they are as follows:

On September 7, 1945, the Commissioner assessed against taxpayer Earl L. Marshal, doing business as

Marshal Logging Company, Blue River, Oregon, federal withholding taxes for the second quarter of 1945, including penalty and interest, totalling \$1,260. The Commissioner's assessment list (including the foregoing assessment) was received by the Collector of Internal Revenue of Oregon on September 19, 1945. On that date payment was demanded from taxpayer, but without avail. On October 17, 1945, the Collector issued a statutory warrant for distraint, commanding a levy and sale of all property or rights to property belonging to taxpayer Earl L. Marshal, or property on which a federal tax lien existed. Thereafter, on October 20, 1945, a notice of federal tax lien was filed in the office of the County Clerk for Lane County, Oregon. (R. 39, 40.)

Between October 26, 1945, and January 25, 1946, Earl L. Marshal was the owner of a certain caterpillar tractor more particularly described as "D-8 Caterpillar Tractor with Dozer and Winch Attachments," Serial No. 1H4589, subject to a chattel mortgage in favor of Lewis Neuman, which was assigned to Otto W. Heider after its execution. On January 25, 1946, Roy O. Stotts loaned \$5,820 to Marshal to satisfy the Heider mortgage, and in return received a bill of sale to the caterpillar tractor which the Supreme Court of Oregon held¹ to be simply a chattel mortgage to secure repayment of the \$5,820 plus a service charge, making the total secured indebtedness \$6,000. (R. 41.)

On May 29, 1946, Marshal executed a bill of sale to appellant Johnston of all his right, title, and interest in

¹*Stotts v. Johnson and Marshall*, 192 Ore. 403, 234 P. 2d 1059, rehearing denied, 235 P. 2d 560 (Ore.).

and to the caterpillar tractor subject to a note held by Stotts for the following consideration: (1) \$750 cash; (2) appellant's promissory note for \$1,200; and (3) appellant's agreement to assume payment of the outstanding indebtedness to Stotts, at least in the amount of \$4,100. (R. 41.)

In the early part of July 1948, appellant was in possession and control of the above-mentioned caterpillar tractor in Clackamas County, Oregon, and "on such date," appellees Borthick and Curran located the tractor in Clackamas County, took possession thereof pursuant to the warrant, and thereafter caused the tractor to be moved to Portland, Oregon. (R. 41-42.)

The record further discloses that on July 2, 1954, appellant filed a complaint in the District Court for the District of Oregon (R. 44), which he subsequently (February 1, 1955) amended (R. 45). It was alleged in the amended complaint (R. 3-4), stipulated (R. 18-19), and the District Court found (R. 39-40), that at all times material appellee Hugh Earle was the Collector of Internal Revenue for the District of Oregon, and, as such, a federal officer; that appellee Walter S. Shanks was the Chief Field Deputy in charge of Deputy Collectors of Internal Revenue for the District of Oregon, and, as such, a federal officer; and that appellees Irwin Borthick and Irving H. Curran were Deputy Collectors of Internal Revenue for the District of Oregon, and, as such, federal officers, acting under the direction of Shanks, who in turn acted under the direction of Earle. It was further alleged that, acting under a war-

rant of distraint directed generally against the property of taxpayer Earl Marshal, appellees Curran and Borthick did, on or about July 10, 1948,² "levy upon, seize and remove from the property and possession of plaintiff in Columbia County, Oregon, a certain caterpillar tractor, the property of plaintiff"; that the seizure was made "without cause or legal authority under the laws of the United States pertaining to seizure" and "under the pretense of the collection of a certain lien against one Earle Marshall" who at the time and place of the levy and seizure "had no interest in or to said tractor and defendants and each of them did thereby take and convert the same to their own use and purposes"; that "such action deprived plaintiff of the property without just compensation and without the process of law contrary to the Constitution of the United States"; that appellant had purchased the tractor from Earl Marshal without either actual or constructive notice of the existence of any lien against the property; that the seizure was made by appellees while acting as officers of the Internal Revenue Service "but without color of authority"; and that the value of the tractor at the time and place of levy and seizure was \$15,000, for which sum appellant demanded judgment against the appellees. (R. 4-5.)

The District Court concluded (R. 42; Appendix B, *infra*) that appellees were each federal officers "acting within the scope of their authority in taking the tractor from plaintiff's possession," and entered judgment for appellees (R. 43).

²Mistakenly stated to be "1945."

SUMMARY OF ARGUMENT

The sole issue herein is whether a Collector and Deputy Collectors of Internal Revenue may be held liable for damages for the alleged unlawful conversion of certain property (a caterpillar tractor) of appellant, where the acts of the officials in levying upon the property were performed entirely within the scope of the authority vested in them by law. Although the amended complaint alleges an unlawful conversion of the tractor, consequent upon an alleged unlawful seizure, the appellant has totally failed to prove his allegations.

The record discloses that taxes in satisfaction of which the property was seized were assessed against the taxpayer Marshal; that the assessment list, including those taxes, was received by the Collector then in office; and that a notice of federal tax lien was duly filed in the office of the clerk of the county "within which the property subject to such lien is situated" as prescribed by federal and state law. No question is raised as to the form or sufficiency of the assessment or the assessment list. It is clear, moreover, that property is "situated" in the county where the owner thereof resides.

Under the provisions of Sections 3670 and 3671 of the Internal Revenue Code of 1939, the lien of the Government herein arose on the date (September 19, 1945) the assessment list was received by the Collector, and attached to "all property and rights to property" of the taxpayer. Under the provisions of Section 3672 that lien

was valid as against a subsequent "purchaser," such as appellant herein, once notice thereof was filed (October 20, 1945) in the office of the Clerk of Lane County, Oregon, wherein taxpayer resided and the property in question "situated."

Shortly after the notice of lien was filed as prescribed, taxpayer acquired the property (tractor) in question, subject to a chattel mortgage. He remained the owner thereof until May 29, 1946, when he sold his right, title, and interest therein to appellant Johnston. Since the lien of the Government for taxes attaches to after-acquired property, it attached to taxpayer Marshal's property rights in the tractor at the time he acquired it and was in effect when the Deputy Collectors, acting under the direction of their lawful superiors and a valid warrant for distraint, seized and levied upon it. Thereafter, a chattel mortgagee, one Stotts, paid the amount of the delinquent taxes, and the tractor was released to the appellant and disposed of as described in another lawsuit, entitled *Stotts v. Johnston and Marshall*.

The receipt of the assessment list referred to above constituted the warrant of the Collector to distrain and levy upon the property in question and also constituted his authority to issue a warrant for distraint directing the Deputy Collectors to levy upon such property. The latter warrant was in all respects valid and appellant has not demonstrated otherwise. Even apart therefrom, the distraint and levy was made in relation to matters committed by law to the control and supervision of the Collector and Deputy Collectors.

Under the circumstances, there was in fact no illegal conversion of appellant's property. The Collector and Deputy Collectors acted within the scope of their authority and may not be held liable in damages.

ARGUMENT

The Evidence Clearly Establishes That the Acts of the Appellees Were in all Respects Lawful

Appellant seeks to recover damages from appellees, a Collector and Deputy Collectors of Internal Revenue, for the alleged unlawful conversion of a certain caterpillar tractor arising from the alleged unlawful seizure thereof from his "property and possession." (R. 3-5.)³ The court below held (R. 42) that the appellees were each federal officers acting within the scope of their authority in taking the tractor from appellant's possession, and entered judgment (R. 43) in their favor. It appears to be appellant's position that the action of the Collector and Deputy Collectors was wrongful (1) because there was no valid lien on the property, and (2) the warrant for distraint was invalid. The evidence establishes the contrary.

A. The lien was valid

On September 7, 1945, the Commissioner assessed against taxpayer Earl L. Marshal, doing business as Marshal Logging Company, Blue River, Oregon, federal with-

³Basically, he is seeking to assert a right to the tractor as "purchaser" thereof superior to the lien of the Government for taxes assessed against taxpayer Marshal from whom he purchased the tractor.

holding taxes for the second quarter of 1945 in the total amount of \$1,260. (R. 39.) The assessment list was received by the Collector's office on September 19, 1945, and on that date notice was given taxpayer and demand for payment made; taxpayer, however, neglected to pay any portion of the amount assessed. (R. 39.) Section 3670 of the Internal Revenue Code of 1939 (Appendix A, *infra*) provides that, if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Section 3671 of the Internal Revenue Code of 1939 (Appendix A, *infra*) further provides that unless another date is specifically fixed by law—

the lien shall arise at the time the assessment list was received by the collector [in this case, September 19, 1945] and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

Section 3672(a)(1) of the Internal Revenue Code of 1939 (Appendix A, *infra*) provides that such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor, until notice thereof has been filed by the Collector:

In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; * * *

The Uniform Federal Tax Lien Registration Act of Oregon (Section 87.805 of 1 Oregon Revised Statutes (1953), Appendix A, *infra*) provides in material part that notices of liens for taxes payable to the United States shall be filed in the offices of county clerks for the county or counties of the state "within which the property subject to such lien is situated."

The notice of federal tax lien for the taxes here involved was filed in the office of the County Clerk for Lane County, Oregon, on October 20, 1945. (R. 39.) Appellant argues, however, but without citation of any record references, that the "evidence" proved the tractor was not in Lane County between the date of filing the notice of lien and the date of appellant Johnston's purchase of the tractor; he also states (citing the "Additional Memorandum" decision of the court dated June 17, 1955; Appendix B, *infra*) that the lower court properly held that the appellees made a "'mistake' of fact" in believing that the tractor was in Lane County. (Br. 11.) The latter statement is incorrect for the court actually stated that it doubted the correctness of plaintiff's (appellant's) *assumption* on re-argument that the tractor was not in Lane County "between October 20, 1945, and May 29, 1946, the key dates."

Whether the tractor was or was not physically located in Lane County, Oregon, at the time of the seizure or alleged conversion is immaterial⁴ for taxpayer was a resident of that county at the time the notice of lien

⁴It is noted that, at the trial of this case, the witness Shanks mistakenly assumed that it was material and controlling (R. 95.)

was filed. In *Investment & Securities Co. v. United States*, 140 F. 2d 894 (C.A. 9th),⁵ a bank in the State of Washington owed money to a taxpayer whose residence was in Wisconsin. The Government's tax lien was filed with the Clerk of the District Court of Wisconsin and with the Register of Deeds of Outagamie County, Wisconsin, but not in Washington. This Court held (p. 896):

The taxpayer here is a resident of Wisconsin and the notice of lien was duly recorded there. The appellant's contention that the recording should have been in the State of Washington rather than Wisconsin, the taxpayer's domicile, is in error.

To the same effect is *Grand Prairie State Bank v. United States*, 206 F. 2d 217 (C.A. 5th), which involved an action by the United States to enforce its income tax lien against certain diamond rings owned by taxpayer but in possession of the bank as a mortgagee and pledgee thereof as security for a loan. Notices of tax liens were filed in Tarrant County, Texas, the residence of the taxpayer. Thereafter, taxpayer obtained a loan from the bank doing business in Dallas County, Texas, pledged the rings as security therefor, and also executed a chattel mortgage covering the rings as evidence of the pledge. The trial court held that the liens of the United States, having been filed for record in the county of the taxpayer's residence prior to the date the bank acquired its lien against the rings, were superior to the bank's lien. On appeal the bank contended, *inter alia*, that, although

⁵Affirming a decision of the District Court reported at 49 F. Supp. 620 (E.D. Wash.) See also *United States v. Kings County Iron Works*, 224 F. 2d 232, 237 (C.A. 2d).

the notices of liens were properly filed in Tarrant County, the domicile of the taxpayer, the failure of the Collector to file the notices for record in Dallas County prior to the time it acquired its claim against the rings operated to subordinate the liens of the United States to its liens. It was argued that because of the transitory nature of the property, and of personal property in general, notices of tax liens recorded in Tarrant County were ineffective to give constructive notice to a mortgagee or pledgee that acquired its claim against the property after it was removed from that county. Since the language of the Fifth Circuit's opinion affirming the judgment of the trial court is particularly appropriate and applicable to the situation herein, we quote therefrom as follows (p. 219):

The statute, however, does not require a tax lien to be filed in every county to which personal property may be carried in order to be enforceable against a subsequent mortgagee or pledgee. The requirement that notice of lien be filed in the office in which the filing of such notice is authorized by the law of the state in which the property subject to the lien is situated is satisfied, so far as is pertinent here, when such notice is filed in the county of the taxpayer's domicile. * * * It is the transitory nature of personal property which requires the application of this rule. To hold otherwise, would be to overlook the practical necessities of the situation and would require the Collector to file tax liens in every jurisdiction to which the taxpayers may at any time remove the property. We do not think this result was intended by the statute, * * *

While the burden was on appellant to show that the residence of taxpayer was not in Lane County, Oregon,

at the time (October 20, 1945) the notice of lien was filed therein, we submit that the record affirmatively shows that his residence was in that county. Thus, Exhibit 28, which consists of several documents constituting records of taxpayer in the hands of his accountant (R. 53-54),⁶ all of which show taxpayer's residence at and about the time in question to be at places in Lane County; they are as follows: (1) a letter from the Secretary of the State of Oregon, dated October 3, 1945, and addressed to taxpayer at the Gold Star Cottages, Eugene, Oregon; (2) a payroll audit of the Marshal Logging Company, operated by taxpayer, covering the period July 1, 1945, to October 11, 1945, listing his address at Eugene, Oregon; (3) a bill to taxpayer from the "Eugene Register Guard" dated October 25, 1945, and addressed to him at the Gold Star Cottages, Springfield, Oregon, for a want ad placed by him under date of October 20, 1945; the ad lists a Springfield telephone number; (4) a burning permit issued to taxpayer on October 25, 1945, listing his address at Vida, Oregon. In addition Defendant's Exhibits 9 and 10, being statements of financial condition executed by taxpayer on August 27, 1945, and November 1, 1945, respectively, list his address, respectively, at Vida and Eugene, Oregon. (R. 34.) Furthermore, taxpayer testified (R. 109) that to the best of his knowledge he lived at Vida, Oregon, on August 27, 1945, and at Eugene, Oregon, on October 20, 1945, and November 1, 1945. The addresses mentioned, namely, Eugene, Springfield, and Vida, are all places located in Lane

⁶Erroneously referred to therein as Defendant's Exhibit 19.

County, Oregon (Directory of Post Offices, United States Post Office Department).

Shortly after the notice of lien was filed, and between October 26, 1945, and January 25, 1946, taxpayer was the owner of the caterpillar tractor involved herein, subject to a chattel mortgage in favor of one Neuman, which had been assigned to one Heider. On January 25, 1946, one Stotts loaned taxpayer approximately \$6,000 to satisfy the Heider mortgage, and in return received a bill of sale to the caterpillar tractor, which the Supreme Court of Oregon held in the case of *Stotts v. Johnston and Marshall*,⁷ 192 Ore. 403, 234 P. 2d 1059, rehearing denied, 235 P. 2d 560, to be simply a chattel mortgage. After the Heider mortgage was satisfied, and on May 29, 1946, taxpayer executed a bill of sale to appellant of all his right, title, and interest in and to the tractor subject to the note (chattel mortgage) held by Stotts. (R. 41.)

⁷In that case, Stotts brought suit against Johnston and Marshal (the appellant and taxpayer, respectively, herein) to foreclose a "bill of sale" covering the tractor which he alleged to be simply a chattel mortgage, and to recover the amount of the taxes involved in the instant appeal which Stotts had paid to the Collector of Internal Revenue in order to preserve his interest in the tractor which had been seized for tax sale. After institution of the suit, and by virtue of a stipulation signed by the parties (see R. 29-30), one Wonderly, who had purchased the tractor from Johnston, deposited the sum of \$9,000 with the clerk of the county court as a substitute for the tractor. The Oregon Supreme Court stated (p. 1061) that the record in that case indicated that the deposited sum belonged, in fact, to Johnston. The county court entered a decree in favor of Stotts and against Marshal, directing payment of \$6,000 (the amount of the chattel mortgage) and \$1,320.71 (the amount of the delinquent taxes paid, including costs) out of the fund deposited in court; the remainder was to be delivered to Johnston. On appeal by Johnston, the Oregon Supreme Court affirmed the judgment, but directed that the decree also include judgment in favor of Johnston and against Marshal.

While it is true therefore that at the time the tractor was seized by appellee Borthick and Curran pursuant to the warrant of distraint, appellant was the owner thereof, that fact is immaterial in so far as the validity of the seizure thereof is concerned for he was "owner" subject to the federal lien. He was not a "purchaser" thereof within the meaning of Section 3672(a)(1) at the time of the recordation of the Government's lien. *United States v. Scovil*, 348 U.S. 218, 221; *United States v. Kings County Iron Works*, 224 F. 2d 232, 237 (C.A. 2d). And see *MacKenzie v. United States*, 109 F. 2d 540 (C.A. 9th), and *United States v. Phillips*, 198 F. 2d 634 (C.A. 5th).

As previously pointed out, the Government's lien for taxes is valid as against a subsequent purchaser, such as appellant herein, once the notice of lien is filed in the office in which the filing of such notice is authorized by the law of the state in which "the property subject to the lien is situated," i.e., the county in which the taxpayer resides. Furthermore, it is clear that prior to the time he purchased the tractor from taxpayer Marshal, subject to a chattel mortgage in Stotts, appellant was aware of the fact that taxpayer was delinquent in the payment of his federal income tax. It was so held, on the basis of appellant's own testimony in *Stotts v. Johnston and Marshall*, *supra*, wherein the Supreme Court of Oregon quoted Johnston (p. 1061) as testifying that "He (Marshal) told me he owed money to the Internal Revenue and to the State, and, gosh, I wouldn't remember who all." It also appears from that case (pp. 1064-1065, 1066) that Johnston conceded the validity of

taxpayer Marshal's unpaid tax, together with the validity of the Government's lien and the seizure. Since the Government's lien attaches to after-acquired property of a tax delinquent taxpayer (*Glass City Bank v. United States*, 326 U.S. 265), the lien involved herein attached to the caterpillar tractor when taxpayer acquired ownership thereof (October 26, 1945) and persisted until the liability was satisfied (Section 3671 of the Code).⁸

*B. The appellees acted under a valid
warrant for distraint*

Although appellant asserts (Br. 9) that there was no proof of a valid warrant for distraint having been issued, the stipulated facts (R. 18-19) establish the contrary. Appellant obviously misconceives the nature of a warrant for distraint of federal taxes, for he charges (Br. 14-15) that the "warrant" (referring presumably to Defendant's Exhibit 11) was invalid because (1) it did not in any way describe the property to be seized, (2) it was not issued by the Collector then in office, but by a "former collector," and (3) it "was not regular on its face because it had not been returned within the time limited from its issue date." We are cited to no legal authority as support for these statements, and we know of none. We shall demonstrate, however, that they are erroneous and without merit.

The authority of a Collector or Deputy Collector of federal taxes to distraint and levy upon property of a tax

⁸It appears that the liability for the taxes assessed herein was satisfied prior to sale by payment by the chattel-mortgagee Stotts on July 23, 1948, whereupon the tractor was released to Johnston. (R. 9, 25, 29-30.) And see *Stotts v. Johnston and Marshall*, *supra*, pp. 1060-1061.

delinquent taxpayer is defined and described in the following sections of the Internal Revenue Code of 1939 (Appendix A, *infra*): Section 3640 authorizes and requires the Commissioner to assess all taxes and penalties imposed under the Code; Section 3641 provides that the Commissioner shall certify a list of such assessments when made to the proper collectors "who shall proceed to collect and account for the taxes and penalties so certified"; Section 3651(a)(1) provides that "It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated"; Section 3654 treats of the general powers and duties relating to collection, subsection (a) thereof requires that, within his district, every collector shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and subsection (b) states that every Deputy Collector shall have the like authority to collect taxes levied or assessed; Section 3655(a) provides that, where it is not otherwise provided, the Collector, either in person or by deputy, shall, within ten days after receiving any list of taxes from the Commissioner, give notice to each person liable to pay any taxes stated therein. If such person neglects or refuses to pay the taxes within ten days after notice and demand, the Collector or his deputy is authorized under Section 3690 (Appendix A, *infra*) to collect such taxes, with interest and other additional amounts as required by law, by distraint and sale of the goods, chattels or effects of the taxpayer. In case of such neglect or refusal to pay, the

Collector, pursuant to the provisions of Section 3692 (Appendix A, *infra*), "may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property," except such as are exempt, belonging to the tax delinquent taxpayer "or on which the lien provided in section 3670 exists" for the payment of the sum due, including interest, penalty, and costs. It is also required, by the provisions of Section 3710 (Appendix A, *infra*), that any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the Collector or Deputy Collector making the levy, surrender such property or rights to property to such Collector or Deputy.

It is clear from the foregoing provisions that the authority of a Collector to distraint and levy, or his warrant for distraint, is the receipt of the assessment list from the Commissioner. That this is so was made plain by the Supreme Court at an early date in the case of *Erskine v. Hohnbach*, 14 Wall. 613, which involved an action in trespass against a Collector for the alleged seizure and conversion to his own use of certain personal property of the plaintiff. In its opinion, the Supreme Court stated (p. 616) that "The assessment, duly certified to him [the Collector], was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constituted his protection." That principle was reasserted in *Haffin v. Mason*, 15 Wall. 671, 675, involving an action to recover from a Collector the value of property seized and sold for payment of certain ex-

cise taxes, wherein it was stated (p. 675) that the assessment list properly certified to the Collector "was his warrant to seize and sell the property, in case the taxes were not paid, after he had made demand for them." See also, *Harding v. Woodcock*, 137 U.S. 43; *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 381; *Powell v. Rothensies*, 183 F. 2d 774 (C.A. 3d).

In the instant case, it is stipulated (R. 18) and the District Court found (R. 39) that the taxes, to satisfy which the caterpillar tractor was seized, were assessed by the Commissioner, and that the assessment list was received by the Collector then in office. No question is raised as to either the form or sufficiency of the assessment or the assessment list, and the receipt of the latter by the Collector constituted his authority or warrant to distrain.

The "warrant for distraint" (R. 19, 34, 40; Deft. Ex. 11) issued by the Collector (Maloney) on October 17, 1945, and directed successively to various deputy collectors, was merely evidence of the Collector's authority to distrain and levy and the "warrant" (Code Section 3692) of the deputy collectors to act for him. While it is true, as appellant asserts (Br. 14), that such warrant did not describe the property in question, such a description is not required by any provision of federal law. The law itself (Section 3690) gives a Collector or Deputy Collector the authority to distrain and sell the goods, chattels, or effects of a taxpayer, and (Section 3692) to levy upon his property and rights to property or on which the lien provided in Section 3670 exists. The warrant referred to was framed in the language of Section

3692 and was directed against the taxpayer, and as demonstrated above, a valid lien did exist on the caterpillar tractor. *Metropolitan Life Ins. Co. v. United States*, 107 F. 2d 311 (C.A. 6th), certiorari denied, 310 U.S. 630.

Whether or not the warrant issued on October 17, 1945, was issued by a "former collector," rather than the one in office at the time the seizure was made is immaterial. The assessment of September 7, 1945, remained unsatisfied and it was the right and duty of any succeeding Collector to enforce their collection (Sections 3651(a)(1) and 3654) pursuant to the certification of September 19, 1945. The validity of the appellee Collector's action is also evidenced by Code Section 3950(a)(1) (Appendix A, *infra*) which provides that every Collector shall be charged with the whole amount of taxes, whether contained in lists transmitted to him by the Commissioner, or by other Collectors, or delivered to him by his predecessor in office.

Appellant's third assertion (Br. 15, 18) that the warrant had not been returned within the "required * * * 90 days" and hence was not "regular on its face" is equally without merit. In the first place, the direction in that warrant (Deft. Ex. 11) to the Deputy Collectors to "make due return to me at this office on or before the sixtieth day after the execution hereof" was merely for administrative purposes, and nothing therein stated that the warrant was to expire and be null and void at the end of that time. Secondly, the authority (Section 3692) of the appellee Collector and Deputy Collectors to levy upon the property or rights to property of tax-

payer "on which the lien provided in section 3670" existed persisted as long as the lien continued, namely (Section 3671), until the liability covered by the assessment list was satisfied or became unenforceable by reason of lapse of time.

C. The appellees acted within the scope of their authority and are not liable in damages

As pointed out above, no question is raised as to the validity of the assessment involved, nor to the form or sufficiency of the assessment list certified to the Collector then in office. It is also clear that a valid lien attached to taxpayer Marshal's property in the caterpillar tractor prior to the time appellant Johnston became a purchaser thereof. Under the circumstances, the Collector and Deputy Collectors were under a ministerial duty to collect the tax, and they cannot be held answerable in damages for so doing. *Erskine v. Hohnbach, supra*; *Haffin v. Mason, supra*; *Harding v. Woodcock, supra*; *Moore Ice Cream Co. v. Rose, supra*; *Powell v. Rothensies, supra*. In the *Haffin* case, the Supreme Court, in discussing a question of liability such as involved herein stated (p. 675):

A ministerial officer, in a case in which it is his duty to act, cannot on any principle of law be made a trespasser. This court, in the recent case of *Erskine v. Hohnbach*, applying this doctrine to a collector of internal revenue, say, that his duties in the enforcement of a tax-list are purely ministerial, and that "the assessment duly certified to him is his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constitutes his protection."

The assessment in this case, duly certified by Hyatt, the assessor, was received in evidence without objection, and no point was raised as to its form or sufficiency. If, then, the assessor had the right to decide the question, whether the plaintiffs were liable to the increased taxation, the list delivered by him to the collector, properly certified, was his warrant to seize and sell the property, in case the taxes were not paid, after he had made demand for them.

It was not the business of the collector to inquire into the case to ascertain whether the assessor had reached a proper conclusion upon the matter submitted to his judgment, nor had he any right to refuse to enforce the assessment.

Similarly, in the *Harding* case which involved an action against a Collector for an alleged wrongful seizure and sale of the property of a plaintiff upon an assessment which was subsequently adjudged to have been invalid, the Supreme Court again reasserted the doctrine of the *Erskine* and *Haffin* cases and held that a liability could not be fastened upon a Collector, a ministerial officer, for the enforcement of an assessment of taxes regular on its face, made by the Commissioner. Of such an officer, the Court said (137 U.S., 48) "the law exacts unhesitating obedience to its process."

Moore Ice Cream Co. v. Rose, *supra*, involved a suit by a corporation against a Collector to recover income and excess profits taxes alleged to have been wrongfully collected under threat of distraint and sale of the corporation's property. In holding that there was no liability, the Supreme Court pointed out (p. 381) that the Collector acted under directions of the Secretary of the Treasury, or other officers of the Government, in the

collection of the tax; that the complaint showed upon its face that the tax had been duly assessed by the Commissioner; that the Collector was therefore under a ministerial duty to proceed to collect the tax; that there was nothing left to his discretion; and that, since his duty was "imperative," he was protected by the command of his superior from liability for trespass. Although it also added that the Collector was entitled as of right to a certificate converting the suit against him into one against the Government,⁹ it observed (p. 382) that the particular case was not one for a certificate of probable cause "as it might be if the officer had trespassed under a mistaken sense of duty."¹⁰ In such circumstances, the Court said, a certain latitude of judgment may be accorded to the certifying judge, though even then it is enough that a seizure has been made upon grounds of reasonable suspicion. It added (p. 382) "One does not speak of probable cause when justification is complete." This latter comment is equally applicable in the circumstances of the instant case, for, as already demon-

⁹Citing *United States v. Sherman*, 98 U. S. 565. See also *Melton v. United States*, 36 F. 2d 609 (C.A. D.C.); *United States v. Kales*, 314 U. S. 186.

¹⁰It should be pointed out, however, that no certificate of probable cause could in any event be issued here. The action is in tort based upon an act of an employee of the Government and is a tort claim arising in respect of the assessment of a tax, both of which are specifically excepted from 28 U.S.C., Section 1346 (b), by the provisions of 28 U.S.C., Section 2680 (a) and (c). Cf. *Dalehite v. United States*, 346 U.S. 15; and see *United States v. Worley*, 213 F. 2d 509, 512 (C.A. 6th), certiorari denied, 348 U.S. 917; and Judge Fee's order of December 12, 1952, in the former case of *Johnston v. United States* (Civil No. 4978, Ore.), dismissing for lack of jurisdiction a suit brought by appellant herein against the United States as being within the exception of 28 U.S.C., Section 2680 (c).

strated, the fact is that the seizure of the tractor was completely justified, and whether or not the Collector or Deputy Collectors had any "belief" or "information" that a lien existed (Br. 4, 9, 20-26) is of no consequence. Admittedly, they all acted in their official capacities and pursuant to the lawful authority of their superior officers. (R. 18-19, 39-40.) Moreover, since a valid lien existed in favor of the Government, this is not a case, as appellant mistakenly conceives it (Br. 10-11, 15-16, 19), of seizing the property of one person to satisfy the taxes of another. Cf. *Stuart v. Chinese Chamber of Commerce of Phoenix*, 168 F. 2d 709 (C.A. 9th), in which circumstance this Court has held that a civil action would lie to recover the amount collected—here \$1,-320.71.

Finally, the case of *Powell v. Rothensies*, *supra*,¹¹ also stands as authority for the position of the appellees herein and as support for the holding of the District Court that they acted "within the scope of their authority in taking the tractor from plaintiff's possession." (R. 42; Appendix B, *infra*.) That case also involved an action to recover damages from a former Collector for the alleged illegal seizure and sale by him of certain of the property of the plaintiff therein. In affirming the decision of the lower court (86 F. Supp. 701 (M.D. Pa.)), the Third Circuit pointed out that at the time of the levy and seizure there were outstanding in the hands of the defendant Collector two unpaid assessments against the

¹¹See also *Herwig v. Crenshaw*, 188 F. 2d 572 (C.A. 4th), certiorari denied, 342 U.S. 905, and *Sidbury v. Gill*, 102 F. Supp. 483 (E.D. N.C.).

plaintiff of manufacturer's excise taxes and that the warrant for distraint under which the levy and seizure were made was expressly based upon those two outstanding unpaid assessments. Under such circumstances, the Court, concluded (p. 775) that it was within the scope of the Collector's ministerial duty to make the levy and collection there in controversy "and he cannot be held answerable in damages for so doing."

In its opinion in the above-cited case, the lower court said (p. 702) that for acts to be considered "within the scope of official authority" they need not be prescribed by statute or even specifically directed or requested by a superior officer, but that it was sufficient if they were done by an officer "in relation to matters committed by law to his control or supervision," or were governed by a lawful requirement of the department under whose authority the officer acted.¹² That court also pointed out that the legal principle generally applied to a situation such as existed therein was that, as to many governmental officers, even the absence of probable cause and the presence of malice or other bad motive were not sufficient to impose liability upon such an officer who acted within the scope of his authority. Having reference then to the facts of this case and the applicable law, it is an *a fortiori* proposition that the Collector and Deputy Collectors acted "within the scope of their authority," that they did not convert property of the appellant to their own use, and that they are not liable to him in damages, indeed, the facts affirmatively show that appellant suffered no injury.

¹²See also *Cooper v. O'Connor*, 99 F. 2d 135 (C.A. D.C.).

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectively submitted,
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JULY 1956

APPENDIX A

Internal Revenue Code of 1939:

SEC. 3640. ASSESSMENT AUTHORITY.

The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law. (26 U.S.C. 1952 ed., Sec. 3640.)

SEC. 3641. CERTIFICATION OF ASSESSMENT LISTS TO COLLECTORS.

The Commissioner shall certify a list of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified. (26 U.S.C. 1952 ed., Sec. 3641.)

SEC. 3651. COLLECTION AUTHORITY.

(a) *In General.*—

(1) *Within district.*—It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3651.)

SEC. 3654. GENERAL POWERS AND DUTIES RELATING TO COLLECTION.

(a) *Collectors.*—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books,

papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the manner as provided in section 3615.

(b) *Deputy Collectors*.—Every deputy collector shall have the like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself; but each collector shall, in every respect, be responsible, both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done or neglected to be done, by any of his deputies while acting as such.

(c) *Internal Revenue Agents*.—Every internal revenue agent shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto.

(26 U.S.C. 1952 ed., Sec. 3654.)

SEC. 3655. NOTICE AND DEMAND FOR TAX.

(a) *Delivery*.—Where is it not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3655.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in

favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 152 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672 [as amended by Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office with the State or Territory; or

* * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

SEC. 3690. AUTHORITY TO DISTRAIN.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such in-

terest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid.

(26 U.S.C. 1952 ed., Sec. 3690.)

SEC. 3692. LEVY.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy.

(26 U.S.C. 1952 ed., Sec. 3692.)

SEC. 3710. SURRENDER OF PROPERTY SUBJECT TO DISTRAINT.

(a) *Requirement.*—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

(c) *Person Defined.*—The term “person” as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U.S.C. 1952 ed., Sec. 3710.)

SEC. 3950. CHARGES AND CREDITS.

(a) *Charges.*—Every collector shall be charged with—

(1) *Taxes.*—The whole amount of taxes, whether contained in lists transmitted to him by the Commissioner, or by other collectors, or delivered to him by his predecessor in office, and the additions thereto:

* * * * *

(26 U.S.C. 1952 ed., Sec. 3950.)

1 Oregon Revised Statutes (1953):

UNIFORM FEDERAL TAX LIEN REGISTRATION ACT

87.805 *Federal tax lien registration; filing of notice of lien and certificate of discharge.* Notices of liens for taxes payable to the United States of America and certificates discharging such liens shall be filed in the offices of the recorder of conveyances, in counties which have a recorder of conveyances, and in other counties in the offices of the county clerks, for the county or counties in this state within which the property subject to such lien is situated.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

ART JOHNSTON,	Plaintiff,)	
)	
	vs.)	
)	Civil 7571
HUGH EARLE,	Collector of)	
Internal Revenue,	JOHN DOE)	MEMORANDUM
SHANKS, JOHN SMITH)	OF DECISION
BORTHWICK and JAMES ROE)	
KERN,)	
	Defendants.)	

The rule appears to be that a public official acting "within the scope of his authority" is immune from personal liability for mistake of fact. *L. Hand in Gregoire v. Biddle*, 177 F. 2d. 579.

"Scope of authority" does not mean that the officer must have acted rightly. I would judge from the oral argument plaintiff is under that misapprehension.

Pacific Telephone & Telegraph Co. v. White, 104 F. 2d. 923, appealed from this district (24 F. Supp. 871), was a beatup by the chief private police officer of the Telephone company on the suspected master-minder of a sensational daylight robbery. "Scope of authority" was discussed in that case.

In *Nelson v. American-West African Line*, 86 F. 2d. 730 Learned Hand held a ship owner liable for the violent acts of a drunken bosun.

In the case at bar, defendants were, in my opinion, acting within the scope of their authority, as the phrase is known to the law. I will make such a finding and the conclusion of immunity will necessarily follow from the finding.

No costs.

Dated May 10, 1955.

/s/ Claude McColloch
Judge

Endorsed:

Filed May 10, 1955

F. L. Buck, Acting Clerk

By R. DeMott, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ART JOHNSTON,	Plaintiff,)	
)	
vs.)	
)	Civil No. 7571
HUGH EARLE, Collector of)	
Internal Revenue; JOHN DOE)	ADDITIONAL
SHANKS; JOHN SMITH)	MEMORANDUM
BORTHWICK; and JAMES ROE)	
KERN,)	
Defendants.)	

This is a case of many points and plaintiff urges me on re-argument to pass on other points.

This raises a question of method, a question often pressed on judges. A newcomer to the Federal appellate bench ventured some years ago that a trial judge should in most cases deny motions for directed verdicts, so the appellate courts could pass on the cases. One of the many things the judge who ventured the dictum over-

looked, was that only a small percentage of cases are appealed.

Plaintiff assumed on re-argument that the tractor was not in Lane County between October 20, 1945, and May 29, 1946, the key dates. I doubt very much if that is correct, despite the fact that Judge Fee so held in the earlier Tort Claims case. That case was obviously badly tried, so much so, that both parties joined in representing to the court the tractor had been seized in Columbia County, whereas, in fact, the seizure was in Clackamas County.

I feel impelled to adhere to my former opinion. If it be thought that "scope of authority" is a conclusion of law rather than a fact, I now add to the conclusions of law that defendants were acting within the scope of their authority.

Plaintiff's judicial admissions in the state court case must weigh heavily against him on the issue of validity of the seizure. Compare *Lane v. Fitzsimmons Stores*, 62 F. Supp. 89, including notes.

Dated June 17, 1955.

/s/ Claude McColloch
Judge

I had not thought it necessary to point out that on no possible theory is former Collector Earle liable.

I may add the "mistake of fact" I had in mind was that the tractor was in Lane County between the key dates.

/s/ C.MCC

Endorsed:

Filed June 17, 1955

F. L. Buck, Acting Clerk

By H. S. Kenyon, Deputy.

CITATIONS

Page

CASES

Cooper v. O'Connor, 99 F. 2d 135	25
Dalehite v. United States, 346 U.S. 15	23
Erschine v. Hohnbach, 14 Wall. 613	18, 21, 22
Glass City Bank v. United States, 326 U.S. 265	16
Grand Prairie State Bank v. United States, 206 F. 2d 217	11
Haffin v. Mason, 15 Wall. 671	18, 21, 22
Harding v. Woodcock, 137 U.S. 43	19, 21, 22
Herwig v. Crenshaw, 188 F. 2d 572, certiorari denied, 342 U.S. 905	24
Investment & Securities Co. v. United States, 140 F. 2d 894, affirming 49 F. Supp. 620	11
Johnston v. United States, dismissed December 12, 1952	23
MacKenzie v. United States, 109 F. 2d 540	15
Mellon v. United States, 36 F. 2d 609	23
Metropolitan Life Ins. Co. v. United States, 107 F. 2d 311, certiorari denied, 310 U.S. 630	20
Moore Ice Cream Co. v. Rose, 289 U.S. 373	19, 21, 22
Powell v. Rothensies, 183 F. 2d 774	19, 21, 24
Sidbury v. Gill, 102 F. Supp. 483	24
Stotts v. Johnston and Marshall, 192 Ore. 403, 234 P. 2d 1059, rehearing denied, 235 P. 2d 560	3, 7, 14, 15, 16
Stuart v. Chinese Chamber of Commerce of Phoenix, 168 F. 2d 709	24
United States v. Kales, 314 U.S. 186	23

United States
COURT OF APPEALS
for the Ninth Circuit

ART JOHNSTON,

Appellant,

vs.

HUGH EARLE, Collector of Internal
Revenue, et al,

Appellee.

*Appeal from the United States District Court for the
District of Oregon.*

APPELLANT'S REPLY BRIEF

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FILE

AUG 10 1956

PAUL P. O'BRIEN, CLERK

INDEX

	Page
A. Validity of Lien	1
B. Validity of Warrant	9
C. Scope of Authority	13
D. General	15
Conclusion	21

TABLE OF AUTHORITIES

CASES CITED

Erskin v. Hohnbach, 14 Wall. 613	13
Federal Trade Commission v. Raladam Co., 283 U.S. 643	13, 21
Geitz v. Gray, 280 S.W. 2d 859	8
Glass City Bank v. United States, 326 U.S. 265	8
Grand Prairie State Bank v. United States, 206 F. 2d 217	5
Gulf Coast Marine Ways v. The J. R. Harder, 107 F. Supp. 379	7
Haffan v. Mason, 15 Wall. 671	13
Harding v. Woodstock, 137 U.S. 43	13
Hawkins v. Savage, 110 F. Supp. 615	11
Highsmith v. Laur (1955 Cal.), 281 P. 2d 865	7
In re Holdsworth, 113 F. Supp. 878	10
In re Rosenberg's Will, 199 N.E. 206	10
Investment and Securities Company v. United States, 140 F. 2d 894	5
Land v. Dollar, 330 U.S. 738	21
Metropolitan Life Ins. Co. v. U. S., 107 F. 2d 311	16
Moore Ice Cream Co. v. Rose, 289 U.S. 373	13, 16
Powell v. Rothensies, 183 F. 2d 774	13
Shepard v. Hynes, 104 F. 449	19
Siverson v. Clanton, 171 Pac. 1051	16
Sorenson v. Jacobsen, 232 P. 2d 332	19
Swenson v. Jacobsen, 232 F. 2d 332	14

TABLE OF AUTHORITIES (Cont.)

	Page
U. S. v. Aetna Life Insurance Co. of Hartford, Conn., 46 F. Supp. 30.....	10
U. S. v. Beaver Run Coal Co., 99 F. 2d 610.....	6
U. S. v. Eiland (1955), 223 F. 2d 118.....	8
U. S. v. Emigrant Industrial Savings Bank, 122 F. Supp. 547.....	11
U. S. v. O'Dell, 160 F. 2d 304.....	10
U. S. v. Manufacturer's Trust Co., 198 F. 2d 366.....	11
Weinke v. Majeske, 97 P. 2d 179.....	20
Williams v. International Harvester, 141 P. 2d 837	19, 20

STATUTES CITED

Title 26, Section 3672.....	6, 8, 9
Title 26, Section 3672 (a).....	5
Title 26, Section 3672 (b).....	6
Title 26, Section 3672 U.S.C.....	2
Title 26, Section 3670 - 3672 U.S.C.....	2
Title 26, Section 3654 (a) U.S.C.....	10
Title 26, Section 3692 U.S.C.....	10
37.805 Oregon Revised Statutes.....	2

TEXTS CITED

26 ALR 2d 1186.....	19
105 ALR 1238.....	10
150 ALR 239.....	19
53 Am. Jur. 821.....	19
53 Am. Jur. 822.....	19
53 Am. Jur. 924.....	19

No. 14951

United States
COURT OF APPEALS
for the Ninth Circuit

ART JOHNSTON,

Appellant,

vs.

HUGH EARLE, Collector of Internal
Revenue, et al,

Appellee.

*Appeal from the United States District Court for the
District of Oregon.*

APPELLANT'S REPLY BRIEF

For the purpose of reply appellant will answer each point of defendants' answering brief separately.

A. VALIDITY OF LIEN

Defendants contend that although the tractor in question wasn't in the county when the lien was filed, the residence of the taxpayer (Marshall) was in the county where the lien was filed and that is sufficient (Br. 10) to establish a valid lien.

If that contention is a correct interpretation of the

statutes (Title 26, Section 3670 - 3672 U.S.C., and 87.805 Oregon Revised Statutes set forth at page 28, appellant's brief) then plaintiff should not prevail on this appeal, if there is any proof of taxpayer's residence.

It seems almost too obvious to answer that the plain wording of these statutes means what it says (paraphrasing):

Such lien shall not be valid as against any purchaser until notice thereof has been filed by the Collector in the offices of the County Clerk for the County or Counties of this State (Oregon) within which the property subject to the lien is situated.

There is nothing in the statute which even refers to the residence of the taxpayer.

Title 26, Section 3672 U.S.C. and the Oregon recording statutes requires physical presence of the property in the county to make the lien effective as to purchasers.

Counsel for defendants, and the defendants themselves, conceded on trial that in order for a lien to be valid as against purchasers, the property must be physically present in the County in which the property is located.

In some jurisdictions, this may not be a requirement. The statute makes this a matter of the local statute.

Defendants in the lower court relied on the sole theory that the tractor was physically in Lane County. On appeal, different counsel in Washington found no evidence to sustain that theory and now contend it

makes no difference where the property was located.

Defendants in the lower court relied on the sole theory that the tractor was physically in Lane County.

Defendant Shanks (Chief Field Officer) testified (R. 94-95) as follows:

“Mr. Erwin: Q. In order to have a valid lien on it, as to a purchaser for value, the object or article involved must have been located in the county where the lien is filed, at the time the lien is filed?

Mr. Shanks: A. That is right. That is what I said.

Q. My position in that regard is this: at the time you seized it, you had no knowledge as to whether or not the tractor was in Lane County or was not in Lane County, at the time the lien was filed.

A. I had no knowledge; that is right.

Q. None whatsoever?

A. That is right. We are agreed on that, but as I told you before, the men were repeatedly instructed that that is the law. Every man in the District knew that.

Q. Everybody knew that——

A. Yes, sure everybody.”

Based on Mr. Shanks’ own testimony, he not only knew that physical presence of the property in the county where the lien was filed was an absolute requirement as to purchasers but he instructed every man in the district that that was the law.

Mr. Georgeff himself advised the court in this respect as follows (p. 7 original transcript of testimony—not printed):

“Mr. Georgeff . . . notice of lien must be filed in the county where the property is situated to make that lien valid.”

And on page 9 as follows:

"The Court: You claim, aside from the situs of the tractor, that would give you a lien as against his personal property anywhere, even if it were not in Lane County?"

Mr. Georgeff: That is one view. I would not stress that too strongly personally. We contend the evidence will show the tractor was there.

The Court: Do you have evidence to the contrary?

Mr. Erwin: Yes, your honor. So the court will not be misled, it is my understanding . . . and I am sure Mr. Georgeff agrees that as far as purchasers are concerned it is not a question of notice or anything else. The tractor must be in that county or the lien is ineffective. Am I correct on that?

Mr. Georgeff: As I said, there are two views. There is the view that if you record a notice of lien in the County of residence, any property within the state, personal property, would be subject to that lien. I would not go as far as that myself on that point.

Mr. Erwin: I thought we had agreed that was not in issue."

It seems that counsel has forgotten that it is a lawyer's duty not to mislead the court. Mr. Georgeff, who represented defendants on trial was forthright with the trial court and advised that the situs of property was controlling. We are informed the brief was written in Washington, D. C. and this may account for the misleading statements, although it happens frequently enough to make one wonder if these liberties, ignorance of evidence and change of positions have not become "self-appointed prerogatives" of Washington counsel.

In addition to counsel's own admission, two former U. S. Attorneys advised the Collector's office that as to

purchasers a lien would be ineffectual unless the property was in the county when the lien was recorded (see Appellant's Brief pp. 24-25).

Because of the foregoing, we shall not spend a great deal of time in citing authorities.

The only two cases cited by counsel namely: *Investment and Securities Company v. United States*, 140 F 2d 894, and *Grand Prairie State Bank v. United States*, 206 F 2d 217 (Appellees' Br. 11), are not in point.

The Investment Securities case was decided in regard to a pledgee at a time when Section 3672 (a) did not apply to a taxpayer's pledgee and the court specifically decided the case on that ground. The court said:

"It should be noted that the word 'pledgee' was not in the statute (Section 3672) prior to 1939 and therefore would not apply to the rights acquired by assignment in 1937."

In addition, the pledge in that case was (by the instrument of assignment itself) specifically made subject to the claim of the United States for taxes.

The case is not in point.

The other case cited by counsel is likewise not in point.

The case of *Grand Prairie State Bank v. United States* involved a claim of priority between the Federal Tax lien and a bank with whom two valuable diamond rings were pledged as security for a loan. Both the loan and the pledge were made after the government's lien was recorded in the county where the taxpayer resided.

There was no showing that the rings were not located in the county of residence of the taxpayer at the time the lien was filed. If the rings were in the county where the liens were filed, the lien would attach. The presumption is that personal property of the taxpayer is situated in the place of his residence unless another situs is established.

The bank relied on Section 3672 (b). That section provided that the lien itself would be invalid regardless of where filed insofar as purchasers of securities were concerned, if such purchasers did not have knowledge of the lien. The bank said the pledge of the rings should be viewed as a security within the meaning of the exception (subsection b). The court properly overruled the contention.

We point out that if the tractor in the present case was owned by the taxpayer and was in Lane County at the time the lien was filed, the case before this court would not have been brought.

In this case, the taxpayer did not even own the tractor in question when the lien was filed, and it never was physically present in Lane County.

In *United States v. Beaver Run Coal Co.*, 99 F 2d 610, it was specifically held that notwithstanding the mortgagee knew that mortgagor owed income taxes, the mortgage was entitled to preference over tax lien of government where tax lien was filed in the wrong district.

The court further held that it would not read into Section 3672 any limitation based on the equitable doc-

trine of bona fide purchaser without notice so as to give the tax lien priority over lien of mortgagee, which at time of execution of mortgage, knew that mortgagor owed taxes.

In *Highsmith v. Laur* (1955 Cal.), 281 P 2d 865, the court specifically held that a tax lien on property is not valid as against any mortgagee, pledgees, purchasers or judgment creditor until notice thereof has been duly filed in the office of county recorder of county within which the property is situated.

In *Gulf Coast Marine Ways v. The J. R. Harder*, 107 F. Supp. 379, it was held that a State Federal Tax lien statute where they are clear and unambiguous must be construed literally, and where the government does not substantially comply with the lien, the Government's tax lien is not effective against mortgagees, pledgees, purchasers and the like.

The Federal Tax Lien Registration Act provides that local recording statutes govern as to where the recording must be made to be effectual as to purchasers. The local statutes of Oregon provide it must be filed in the county where the property subject to the lien was situated (Appellant's Br. p. 28).

In this case, the tractor was located in Marion County when purchased by taxpayer, and it remained in Marion County. The lien was filed in Lane County.

Other cases could be cited but it would not appear necessary.

The case of *U. S. v. Eiland* (1955), 223 F 2d 118, states the rule in regard to "tangible" property as distinguished from "intangible" property.

The situs of intangible property is presumptively or inferentially that of its owner, but the situs of tangible property is the place where it is physically present.

This is a rule of evidence and does not change the plain wording of the statute in any event.

See also *Geitz v. Gray*, 280 SW 2d 859.

The entire theory of appellant's brief in regard to validity of the lien is based on "residence" of taxpayer and does not require further comment.

We shall make a comment in regard to the first paragraph on page 16 of appellees' brief, however, wherein the case of *Glass City Bank v. United States*, 326 U.S. 265, is cited.

Counsel correctly states the holding of that case which was that the lien continues and attaches to taxpayer's after required property, although there was a strong dissenting opinion.

The error of counsel is in attempting to apply the principle of that case to the facts of this case. It is true that the taxpayer did not even own the property when the notice of lien was filed, but the question in this case is not whether the lien is valid as to the taxpayer but only whether the lien is valid as to a "purchaser." The statute (Section 3672) of course, specifically makes the lien "void" as to a purchaser.

The question in this case is determined not by the validity of the lien itself, or whether it does or doesn't

attach to "after acquired" property of the taxpayer. The sole question is whether a lien is effective under the "exception" set forth in Section 3672 as to a purchaser.

The Section 3672 says the lien is "invalid" as to purchasers.

To summarize, insofar as "validity of lien" is concerned:

Appellant is totally unconcerned with the question of whether the lien was valid as to the taxpayer Marshall.

Appellees' brief is directed solely to that issue.

The lien is "ineffective" or (in the words of the statute) "invalid" as to appellant since he was a purchaser for value (admitted) and comes within the provision of Section 3672 (now 6323).

Not having a "valid" or "effective" lien, the collector or deputy collector are not authorized to seize the property. (See p. 14 and p. 26, Appellant's Brief.)

The burden of proving a valid lien is on defendants. They have failed to sustain the burden (See Appellant's Brief, p. 10).

B. VALIDITY OF WARRANT

The collector of Internal Revenue (now District Director) is charged with the duty to see that *all* laws and regulations relating to collection of internal revenue taxes are faithfully executed and complied with (See

Section 3654, subsection (a), Title 26 U.S.C., and page 17, Appellees' brief).

Appellees' brief in regard to the warrant talks about the duty of the collector and the deputy collector to collect taxes etc., but does not take issue with appellant's sole contention that the warrant under which the seizure was made was invalid.

The only statement we have found indicating any disagreement with appellant's brief is on page 19 of the appellees' brief wherein they contend that the warrant was:

"merely evidence of the Collector's authority to distrain and levy."

It is difficult for us to see how defendants completely ignore the statutes on distraint which permit seizure by the collector himself in person but restrain deputy collectors from seizure unless a warrant is issued (Title 26, Section 3692 U.S.C., p. 14 Appellant's brief).

It must follow that a valid warrant is necessary to seizure of property by deputy collectors.

Appellees cite other sections of the act which have no application. The sections cited are not to be construed in *pari-materia* with the distraint sections in any event. *In re Holdworth*, 113 F. Supp. 878, and *U.S. v. Aetna Life Insurance Co. of Hartford Conn.*, 46 F. Supp. 30; *In re Rosenberg's Will*, 199 NE 206, 105 ALR 1238, Certiorari denied 298 US 669.

In *U.S. v. O'Dell*, 160 F 2d 304, it was held that the proper method of making a levy on a bank account was

the issuing of warrant of distraint, making the bank a party and serving the bank with a notice of levy, copy of the warrants and notice of lien.

See also *U. S. v. Manufacturer's Trust Co.*, 198 F 2d 366, and *U. S. v. Emigrant Industrial Savings Bank*, 122 F. Supp. 547.

Appellant does not contend, as appellees' brief infers, that a warrant must describe the property specifically to be valid. However, appellant does contend that where a warrant is couched in general terms such as "*the property of defendant*" instead of specific terms such as "*one caterpillar tractor serial x x x etc.*," then the officer seizes property at his own risk if it turns out to belong to some one not named in the writ. That is the Federal Rule set for on page 17 of appellant's brief.

The authority of the collector and deputy collector is derived from the statute. They are not so-called "constitutional officers." The statutes from which their authority is derived must be strictly construed. The chief field officer, himself, testified that all his men were instructed that, as to a purchaser, no valid lien existed unless the property was in the county where the lien was filed.

As held in *Hawkins v. Savage*, 110 F. Supp. 615, the government's lien for unpaid taxes which arose at the time the assessment list is received by the collector has no binding force or legal authority, is not legally sufficient or efficacious and lacks authority of law, as against a mortgagee, pledgee, purchaser or judgment creditor unless and until it is recorded.

We have no concern with the validity of the lien as against the taxpayer. We assume it would ordinarily continue until satisfied. In this case, however, it could have been pointed out that the Government did seize and sell a certain donkey engine owned by taxpayer prior to seizing of the tractor in question. The sale brought sufficient to satisfy this lien, but proceeds were erroneously applied to later liens rather than to the lien in question (earlier). Plaintiff contended that the present lien was satisfied, but plaintiff did not raise that point and many others on this appeal.

The statute provides the "collector" shall collect. There is no reference in appellees' brief nor in the statute to any holding, wording or other authority for a levy under a warrant issued by a "former collector." When a "former" collector leaves office, he no longer has any authority to "collect" or to issue warrants of distraint.

It should be remembered that the warrant of distraint is the process by which a deputy collector actually goes out to make a seizure of property. This action requires the protection of a current and valid warrant and not one issued by a "former collector" three years previously which "on its face" is returnable in 90 days.

It is not an administrative measure, but administrative or not, it is "irregular" on its face and an officer who acts under it is not protected. Its authority had expired *by its own terms*. (See p. 18 appellant's brief.)

C. SCOPE OF AUTHORITY

Appellees cite *Erskine v. Hohnbach*, 14 Wall. 613; *Haffin v. Mason*, 15 Wall. 671; *Harding v. Woodstock*, 137 US 43; *Moore Ice Cream Co. v. Rose*, 289 US 373; and *Powell v. Rothensies*, 183 F 2d 774.

Generally, the cases cited stand for the proposition that a valid unpaid assessment against a taxpayer will provide immunity to a collector or deputy collector who collects a tax through seizure and sale or "threat of seizure" (*Moore Ice Cream Co.* case) even if the assessment later turns out to be invalid.

In other words if the assessment list is "regular on its face" it makes no difference if the assessment or the liability later turns out to be invalid. The assessment list is held to be "due process" within the meaning of the Fifth Amendment.

None of the cases cited involve a seizure of a third person's property for satisfaction of a taxpayer's liability, and are not in point. It would not be helpful to the court to discuss the cases individually.

It is only in the case of a purchaser that the statutes in question specifically limit the authority of the collector or deputy collectors to property "on which a valid lien exists," and further sets forth specifically that no valid lien exists as to purchasers "unless the property was located within the county where the lien was filed."

The authority of the public official must be strictly construed and can not be extended. *Federal Trade Commission v. Raladam Co.*, 283 US 643.

None of the cases cited or found hold that an officer is protected when he seizes one person's property for the unpaid assessment of another person's taxes.

The only time such protection would be afforded to ministerial officers is if the warrant under which they proceeded specifically described the property seized.

Under those circumstances if the officer seized the property specifically identified in the warrant, the ministerial officer to whom it was directed would probably be protected even if the property later was found to belong to another not named in the writ. The person who issued the writ, however, might not be protected unless he had a "reasonable belief" in the existence of a valid lien, i.e., if it was an abuse of the discretion vested in him.

To summarize as to "validity of the warrant":

The assessment list is "due process" in the hands of an officer charged with its collection. No "due process" is involved when an officer seizes "y's" property under an assessment against "x" and any statute which authorized such a seizure would be void and unconstitutional. *Swenson v. Jacobsen*, 232 F 2d 332.

No further factual or legal analysis of the cases cited need be made, no matters involved in this case were "committed to defendants' control," by any statute nor were any matters governed by any "lawful requirement" of any department. In fact in this case, the defendants were specifically prohibited from taking the action which they took.

D. GENERAL

The last matter to which our attention is directed by appellees, is counsel's statement that this is not a case where a certificate of probable cause might issue (Br. p. 23).

We presume this is stated in an attempt to sway the court's decision in this case by a feeling of sympathy for the defendants.

The statement of counsel is first, obviously incorrect; and second, improper and unimportant.

The matter of sympathy is not supposed to be present in judicial proceedings. However, if the cause were one in which "probable cause" would not be found, this case would probably not have been filed in the first instance.

Secondarily, this is not a matter of "innocent mistake." If it were, the case would not have been brought. The court should remember that two United States Attorneys on separate occasions advised defendants they had no right to make the seizure. They did it anyway. In addition, to that, the testimony was that all of the defendants were instructed that no lien existed on property unless it was filed in the county where the property was situated, and would not be valid in the hands of a purchaser unless it was, and defendants each by his own admission knew Johnston was a purchaser. They seized his tractor anyway.

To make matters even worse, the defendant Shanks wouldn't even accept Johnston's certified check (Exhibit

18, R. 35) for payment of the lien amount for which the lien was filed, but insisted on delivery of the tractor to the taxpayer Marshall and to his friend Stotts who was actually a joint venturer with Marshall (later held a mortgagee). One of the government's own witnesses testified Marshall was unworthy of belief (even under oath) and who had been arrested for falsification of serial numbers on another "tractor deal."

The law provides that the officers can not adjudicate claims or priorities; they have only the rights given them by statute to seize and sell. *Siverson v. Clanton*, 171 Pac. 1051; *Metropolitan Life Ins. Co. v. U. S.*, 107 F 2d 311, Cert. den. 310 US 630.

All of the foregoing is cited merely to show the court that in the present case, the natural sympathy which appellees attempt to incite should not be called forth in its "full blossomed glory" in the present case even if a certificate of probable cause would not properly issue.

If this case is not a case where a "certificate of probable cause" should properly issue, then certainly the public officials (U. S. Attorneys and Attorney Generals) should not be representing defendants. They should be represented by their own counsel. However, the fact is that the case is properly one for the issuance of such a certificate.

In the *Moore Ice Cream Co. v. Rose* case, 289 US 373, and at 382 the court said that the certifying judge was given a latitude of judgment and that it was enough (for the issuance of a certificate of probable cause) that

a seizure had been made upon grounds of "*reasonable suspicion*."

The final conclusion of counsel is that appellant should not recover because defendants did not convert the tractor to their own use and because appellant suffered no injury.

The matter of "conversion" and "damage" were not discussed in appellant's brief because there was no question in the trial court that unless the officers were immune from liability they would be liable for plaintiff's damages. None of the evidence regarding damage was brought before this court, of course, because it was felt a reversal would require a determination of damage in the lower court.

However, since appellees' brief concludes in this manner appellant will narrate the exact situation regarding the conversion and plaintiff's damage.

The taxpayer in this case (one Marshall) entered into an agreement with one Stotts, an insurance adjuster and promoter whereby the tractor (which had been caught in a flood in Marion County, the damage being adjusted by Stotts) would be put to use on a joint venture basis in land clearing in Marion County. Taxpayer's mortgage on the tractor (which was in default) was paid off by Stotts. A bill of sale of the tractor appeared to have been given by the taxpayer (Marshall) to Stotts. When Marshall did not live up to his promises, in regard to the joint venture, Stotts ordered Marshall to sell the tractor. He sold it to Johnston (the plaintiff) at Stotts' demand. The tractor was seized by the govern-

ment nearly three years after Johnston's purchase over Johnston's repeated and continuous objections.

After the seizure, Johnston offered his certified check in the amount of the lien. The Government refused the offer and insisted that the tractor be delivered to Marshall, the taxpayer, and to Stotts who was then claiming a security.

The basis of Stotts' right to bring foreclosure was the Government's attempted lien. If Johnston's check had been accepted, Stotts would have had no right of foreclosure or receivership, since he held only a bill of sale.

The officer, Shanks, held the machine over Johnston's protests until Stotts finally filed suit against both Johnston and Marshall secured the appointment of a receiver in state court claiming a right of unpaid chattel mortgagee. Stotts then paid the Government's lien and the tractor was delivered to the receiver.

Johnston was compelled to secure a bond in order to secure redelivery of the tractor from the receiver. In order to secure a bond in the amount of \$9,000.00, which was a stipulated amount, Johnston was compelled to sell the tractor to one Wonderly who advanced the \$9,000.00.

Johnston was unable to complete his logging contract upon which he was engaged at the time of the unlawful seizure and did not secure a return of his tractor until the Fall of 1948, when he received the tractor back on payment of \$9,000.00 to Wonderly. He lost the logging contract profit and possession of the tractor for a

period of four months at the height of the logging season (original transcript of testimony, p. 151). The reasonable rental value of the equipment for the period of time he was deprived of possession was testified to be at \$1500.00 a month, a total loss of \$6000.00 not to speak of the loss of profit on his logging contract, together with the \$9000.00 he had to pay to court, all of which was exhausted.

Counsel for appellees has either failed to read the transcript of testimony or is deliberately false in his statement that plaintiff has not been damaged.

As to the law of conversion, appellees apparently feel that since they did not personally take the property for their own personal use, they are not liable for conversion.

Such is not the law.

A wrongful seizure or sale of property under legal process constitutes a conversion, *Shepard v. Hynes*, 104 F 449; *Williams v. International Harvester*, 141 P 2d 837.

A conversion takes places when there is a distinct act of domination wrongfully exercised over another's personal property in defiance, exclusion or derogation of the title or rights to the owner for possession. 53 Am. Jur. 821; *Williams v. International Harvester* (supra).

Deprivation of possession seems to be the distinguishing factor between trespass and conversion, 53 Am. Jur. 822. See also 150 ALR 239 and 53 Am. Jur. 924; *Sorenson v. Jacobsen*, 232 P 2d 332, 26 ALR 2d 1186.

Damages for conversion generally are the value of the property at the time and place of the conversion.

The issues in this case were so framed and stipulated (R. 32). The question of damages followed this rule as follows:

“What was the value of the tractor at the time of the seizure?”

The only testimony as to value of the tractor was that introduced by plaintiff and was in excess of \$15,000.00 according to the experts (Halsten and Vice) who testified. The minimum figure was \$14,000.00, and the largest figure mentioned in the testimony was \$18,500.00. The value asked by plaintiff was \$15,000.00. Johnston had actually \$17,500.00 in cash money in the tractor at the time of seizure. The \$9000.00 value contended by defendants was a figure stipulated by the parties to permit redelivery from a receiver. It did not represent its market value.

Appellant feels that under the stipulation of the pre-trial order, the parties are bound by the value of the machine at the time of conversion, *Weinke v. Majeske*, 97 P 2d 179.

In *Williams v. International Harvester Co.* (supra), the Oregon court held that loss of use was also recoverable in an action for conversion.

Plaintiff's contention, however, is that plaintiff should be permitted to recover the value of the tractor only.

Appellees apparently feel that Johnston got the tractor back and therefore he wasn't damaged. This is only

partially true as defendants didn't return it but Johnston was obliged to buy it back just as if he went out on the market and bought another tractor. This \$9,000.00 plus the \$9,000.00 put into court was a total of \$18,000.00 additional besides the \$17,500.00 he had in the tractor.

The tractor became rather expensive at this point having cost Mr. Johnston some \$35,000.00 and \$18,000.00 of that cost was occasioned solely by defendants' insistence on seizure of the tractor after they had been independently advised they had no right to do so.

We feel certain Mr. Johnston has suffered some damage and that the trial court will have no trouble in fixing the amount, or we will stipulate that the value may be fixed by this court from the original record.

CONCLUSION

As stated in *Land v. Dollar*, 330 US 738:

"Public officials may become tort feasers by exceeding the limits of their authority when they unlawfully seize or hold a citizen's realty or chattels. . . ."

and as stated in *Federal Trade Commission v. Raladam Co.*, 283 US 643:

"Official powers can not be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They can not be merely assumed by administration officers; nor can they be created by the courts in the proper exercise of their judicial functions."

We might add further "and can never exceed the constitutional restrictions."

Plaintiff believes that the trial court invited the appeal on this case.

The cause should be reversed and remanded with instructions to enter a verdict for plaintiff.

Respectfully submitted,

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